TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible].

No. 767.

JOSEPH HULL, THE PRAIRIE PEBBLE PHOSPHATE COMPANY, AND THE SAVANNAH TRUST COMPANY, APPELLANTS,

vs.

[illegible] E. BURR, FRANK L. [illegible], AND [illegible] EDWARDS [illegible] EDWARDS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE [illegible].

[illegible]

([illegible])

(23,918)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 767.

JOSEPH HULL, THE PRAIRIE PEBBLE PHOSPHATE COMPANY, AND THE SAVANNAH TRUST COMPANY, APPELLANTS,

vs.

ARTHUR E. BURR, FRANK L. SIMPSON, AND J. HOWARD EDWARDS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 9, 1931.

United States Circuit Court of Appeals for the First Circuit, October Term, 1912.

No. 1015.

JOSEPH HULL et al., Complainants, Appellants,
v.
ARTHUR E. BURR et al., Defendants, Appellees.

Appeal from the District Court of the United States for the District of Massachusetts from Final Decree (Dodge, J.), February 24, 1913.

TRANSCRIPT OF RECORD

Upon the Appeal of Joseph Hull et al. in the Above-entitled Cause to the Supreme Court of the United States.

1 United States Circuit Court of Appeals for the First Circuit, October Term, 1912.

No. 1015.

JOSEPH HULL et al., Complainants, Appellants,
v.
ARTHUR E. BURR et al., Defendants, Appellees.

Transcript of Record of District Court.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

At a District Court of the United States Begun and Holden at Boston, within and for the District of Massachusetts, on the First Tuesday of December, Being the Third Day of December, in the Year of Our Lord One Thousand Nine Hundred and Twelve.

Before the Honorable James M. Morton, Jr.

No. 377, Equity Docket.

JOSEPH HULL et al., Complainants,
v.
ARTHUR E. BURR et al., Defendants.

The bill of complaint in this cause was filed in the clerk's office on the eighth day of August, A. D. 1912, and was duly entered at the June Term of this court, A. D. 1912, and is in the words and figures following:—

2 *Bill of Complaint.*

[Filed August 8, 1912.]

[MEMORANDUM—The Bill of Complaint is not here printed, as a Substituted or Amended Bill was filed at a later date and will be found recorded on pages 6 to 27 of this Transcript of Record.

CHARLES K. DARLING, *Clerk.*]

This cause was thence continued to the September Term, A. D. 1912, when, to wit, October 15, 1912, the following Demurrer was filed by consent:—

Demurrer.

[Filed by Consent October 15, 1912.]

The Joint and Several Demurrer of the Defendants, Arthur E. Burr, Frank L. Simpson, and J. Howard Edwards, to the Bill of Complaint Exhibited against Them in the Above-stated Cause.

These defendants not confessing any of the matters in the bill to be true as therein alleged, demur to the said bill of complaint, and for causes of demurrer show:—

First. That the complainants have not in and by their said bill of complaint made or stated such a case as doth or ought to entitle them in the District Court of the United States for the District of Massachusetts, as a court of equity, to the relief therein and thereby prayed, or to any relief.

Second. That the said bill of complaint affirmatively shows that the District Court of the United States for the District of Massachusetts as a court of bankruptcy on a petition filed therein adjudicated the Port Tampa Phosphate Company, a Massachusetts corporation, a bankrupt, and that such corporation appeared in such proceeding and submitted to the adjudication and the jurisdiction of the court by filing schedules and otherwise, and the adjudication so made, as an adjudication of the status of the said corporation as a bankrupt, is not subject to collateral impeachment in this or any other court of equity.

Third. Under the provisions of Section 21*e* and other provisions of the Bankruptcy Act, any inquiry into the title of trustees
3 in bankruptcy, so far as their status as such trustees is concerned, is forbidden in any court other than the bankruptcy court, for the deliberate purpose of preventing such contentions as are sought to be presented for litigation to this court by the bill of complaint.

Fourth. It affirmatively appears from the bill of complaint that the Port Tampa Phosphate Company submitted to the adjudication of bankruptcy, that creditors filed their claims in such proceeding and that this court or a court of bankruptcy is still proceeding with

the same and the adjudication in no way affected any right of the complainants, nor could the same, on the allegation of their bill of complaint, in any way be prejudicial to the complainants.

Fifth. The remedy of the complainants, if any, is in this court as a court of bankruptcy, and not in a court of equity.

Sixth. The bill of complaint shows on its face that the complainants have been guilty of gross laches and only appeal to this court as a court of equity, after another court of equity has refused to entertain the same contentions.

Seventh. The bill affirmatively shows that proceedings are now, and have been long prior to the filing of the bill, pending in equity in the State court of Florida, whose equity jurisdiction is as extensive as that of this court, and the remedy of the complainants, if one exists in a court of equity, must be sought in the State court of Florida.

Eighth. The bill is in effect an attempt in this court to maintain a cross-bill to the bill filed in the Florida State court, on the ground that the Florida State court as a court of equity has held that the contentions of complainants afford no right to relief in a court of equity.

Ninth. The allegations of the bill of complaint are vague, indefinite, uncertain, contradictory and repugnant.

Tenth. On the allegations of the bill of complaint if it could be maintained in a court of equity, both the Port Tampa Phosphate Company and creditors who have proved their claims in the bankruptcy court would be necessary parties, as their rights would be affected by any decree rendered.

Eleventh. Both comity and Section 720 of the Revised
4 Statutes of the United States forbid the maintenance of such a bill as the present.

Twelfth. The bill is filed in this court as a court of equity in order to escape submission to the jurisdiction of this court as a court of bankruptcy, and in order to escape the consequences of an adverse decision in the Florida State court.

Thirteenth. The directors of the Port Tampa Phosphate Company, at the time of the filing of the petition in bankruptcy, could have admitted in writing the inability of the company to pay its debts and its willingness to be adjudged a bankrupt, and it could in no legal sense be a fraud on anyone to suffer the adjudication to be made as alleged in the bill.

Fourteenth. The bill in its essence is an attempt in this court to procure review of proceedings, both in this court as a court of bankruptcy and in the Florida State court as a court of equity, without furnishing or presenting to this court the records in either of the other courts, which must be furnished even in the same court when a bill of review is properly filed in that court.

Fifteenth. The bill seeks to have this court as a court of equity arrest proceedings in the Florida State court as a court of equity, which it admits the Florida State court as a court of equity has held should not be arrested by reason of the same contentions made by the complainants in that court, or, in other words, to have this court

review and overrule the decision of the Florida court, sustained by the Supreme Court of Florida, in a proceeding of which it had prior jurisdiction.

Sixteenth. If the allegations of the bill of complaint are true and Hull was, and the Prairie Pebble Phosphate Company became, through purchase from him, the absolute owner of the premises, the complainants are entitled to no relief in this court, or any other court of equity, as the bill then presents a moot controversy, for the Florida company must decide the merits in favor of the complainants, irrespective of the parties by whom the suit is prosecuted.

ARTHUR E. BURR,
FRANK L. SIMPSON,
Counsel for Defendants.

5 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

I, Arthur E. Burr, do hereby certify that I am of counsel for the defendants in the above proceedings and in my opinion the foregoing demurrer is well founded in law, and I as defendant, being duly sworn, say that the same is not interposed for the purpose of delay.

ARTHUR E. BURR.

Sworn to and subscribed before me this seventh day of October, 1912.

[SEAL.] CHARLES T. COTTRELL,
Notary Public.

STATE OF NEW YORK,
County of New York, ss:

Before me personally came, in the State of New York and County of New York, Frank L. Simpson, who, being by me duly sworn, says that he is one of the defendants named in the foregoing demurrer, and that the said demurrer is not interposed for the purpose of delay.

FRANK L. SIMPSON.

Sworn to and subscribed before me this fifth day of October, 1912.

[SEAL.] JAMES S. MACDONALD,
Notary Public.

STATE OF NEW YORK,
County of New York, ss:

Before me personally came, in the State of New York and County of New York, Frank L. Simpson, who, being by me duly sworn, says that he is of counsel for J. Howard Edwards, one of the defendants named in the foregoing demurrer, that said Edwards is

now out of the State of Massachusetts, that he makes this affidavit on behalf of said Edwards, and that said demurrer is not interposed for the purpose of delay.

FRANK L. SIMPSON.

6 Subscribed and sworn to before me this fifth day of October, 1912.

[SEAL.] JAMES S. MacDONALD,
Notary Public.

This cause was thence continued to the present December Term, A. D. 1912, when, to wit, December 19, 1912, the following Amended Bill of Complaint is filed:—

Amended Bill of Complaint.

[Filed December 19, 1912.]

To the Honorable the Judges of the District Court of the United States for the District of Massachusetts:

Joseph Hull, who is a citizen of the State of Georgia, residing in Savannah, in said State, and the Prairie Pebble Phosphate Company, which, for convenience, is hereinafter referred to as the Prairie Company, a corporation organized and existing under the laws of the said State, and the Savannah Trust Company, a corporation also organized and existing under the laws of the said State, both said corporations having offices at Savannah aforesaid, exhibit this their amended bill of complaint against Arthur E. Burr, Frank L. Simpson and J. Howard Edwards, defendants, who are citizens of the State of Massachusetts, and each of whom is a citizen of the said State and resides in the district aforesaid. And thereupon your orators severally complain and allege as follows:—

First. That the citizenship of your orators and of the defendants is as hereinbefore stated.

Second. That prior to the transactions hereinafter stated, one E. C. Stewart and C. G. Meminger were the owners of and were seized of the fee simple title to certain real property situated in Polk County in the State of Florida, which is more particularly described as follows, to wit:—

The south half, and the south half of the northeast quarter, and the southeast quarter of the northwest quarter of section thirty-four (34) in township twenty-nine (29) south range twenty-three (23) east, containing in all four hundred and forty (440) acres more or less, subject to a right-of-way for a railroad track across said
7 land, together with the buildings situate thereon, eleven dwelling houses and one commissary and office building. Said Stewart and Meminger were then also the owners of certain personal property located upon said premises and described as follows: One drier, three stationary engines, six boilers, five force pumps, one lot of tools, one Worthington pump six by nine by ten,

one feed and service pump, three-inch suction and four-inch discharge; all elevator chains and buckets, two rack cars, twelve hundred feet steel rails, all pulleys, sprockets, wheels, rotary and wrinsing screens, debris, hoppers, one Cameron pump No. 10, one Cameron pump eighteen by nine by twenty, one Cameron pump No. 16,564 six-inch discharge and six-inch suction, one lot of boiler tubes, all iron and galvanized pipe, all pipe fittings, gears, pulleys, valve and valve fittings, one lot of box and post hangers, two vertical marine engines, one Moran joint, as well as of all other personal property then upon said premises, including office furniture and fixtures.

Third. That on or about the twenty-second day of May, A. D. 1905, the said Stewart and Meminger executed and delivered to your orator Joseph Hull a deed of conveyance for a consideration therein stated of about $13,500 wherein and whereby they duly conveyed to the said Hull all of their right, title and interest in and to all of the said properties in consummation of a prior contract; that soon thereafter the said deed was duly recorded upon the records of said Polk County, State of Florida, all in accordance and in compliance with the laws of the State of Florida, and thereby the said Hull was vested with a good legal title in fee simple to all of the said real property, and with full title of ownership to all said personal property with the right to the possession thereof against all persons, and his recorded paper title to all the said properties was perfect.

Fourth. That soon after the delivery to him of said deed of conveyance, the said Hull took possession of all of the said properties, under and in virtue of the said deed, and thereafter continuously held the possession thereof until he conveyed them as hereinafter stated.

Fifth. That on or about the seventh day of June, A. D.
8 1907, in consummation of a contract entered into about one year prior to the said date, the said Hull executed and delivered to your orator the Prairie Company a deed of conveyance of all of his said right, title and interest in and to all the said properties for the consideration of about $37,000, which said deed was soon thereafter duly recorded upon the records aforesaid.

Sixth. That prior to or about the time of the delivery of the said deed to the said Prairie Company, it took the actual and peaceable possession of all of the said properties, which possession it has continued to hold up to the present time.

Seventh. That prior to any of the said transactions, the Prairie Company had been for several years extensively engaged in the County of Polk aforesaid in the business of mining and selling pebble phosphate, and prior to the twenty-sixth day of March, A. D. 1908, had made permanent improvements on the said lands at a cost of not less than $75,000, and the said improvements are at the present time of the value of that sum of money; and that said improvements were made for the use and purposes of its said business.

Eighth. That afterwards and prior to the twenty-sixth day of March, A. D. 1908, the said Prairie Company executed and deliv-

ered to the said Savannah Trust Company a deed of trust, whereby it conveyed all of its right, title and interest in and to the said properties, together with other properties, to secure the payment of bonds issued by the said Prairie Company to the amount of about $1,800,000 face value; and that shortly thereafter the said deed of trust was duly recorded in said Polk County and is still in full force and effect.

Ninth. Your orators aver that, before the delivery of the deed aforesaid by Stewart and Meminger to the said Hull, the Port Tampa Phospate Company, which, for convenience, is hereinafter termed the Port Tampa Company, a corporation organized and existing under the laws of the State of Massachusetts, claimed to own some equitable interest in the said properties under some contract between it and the said Stewart and Meminger, which
9 interest the said Hull purchased for a valuable considera tion, and that, before the delivery of the said deed to Hull, the said Port Tampa Company adopted and placed upon its records a resolution in the words and figures following, to wit:—

"Whereas, the Port Tampa Phosphate Company, by and through its President, H. W. Rowell, has agreed to sell to Joseph Hull, 440 acres of land situated in Polk County, Florida, and all machinery and property of any and all kinds situated thereon and described in a certain contract made and entered into by and between Clarence A. Boswell and Susan H. Boswell, his wife, parties of the first part, and H. W. Rowell, party of the second part; said contract being dated the 19th day of November, 1904 and assigned by the said H. W. Rowell to the Port Tampa Phosphate Co. and by Clarence A. Boswell of the party of the first part to E. C. Stuart and C. G. Memminger. And whereas there is still due to E. C. Stuart and C. G. Memminger upon said contract the sum of $12,112.39; Therefore be it resolved that E. C. Stuart and C. G. Memminger be and they are hereby authorized and directed to make, execute and deliver unto the said Joseph Hull a good deed of conveyance in and to the premises described in said contract free and unencumbered, and the Port Tampa Phosphate Co. does hereby release the said E. C. Stuart and C. G. Meminger upon the execution and delivery of said deed, and from any and all liability under and by virtue of said contract.

"Voted that the President H. W. Rowell is hereby authorized and directed to take immediate steps to carry out the foregoing."

A true record. Attest:

BENJ. L. EMERSON, *Clerk.*

[Seal Port Tampa Phosphate Company, Incorporated, 1904.]

And your orators aver that the said resolution was passed and adopted by the unanimous vote of all the directors of the said Port Tampa Company at a lawful meeting of the said directors; that a part of the said consideration of upwards of $13,300 for the said deed to Hull was paid to the said company, and that the lands and properties mentioned and specified in the said resolution are and

were the identical lands and properties hereinbefore described in this bill.

Tenth. Your orators allege that since the adoption of the
10 said resolution and the delivery by said Stewart and Meminger to your orator Hull of their said deed, the said Port Tampa Company has never, through any officer or agent thereof, asserted or made to either of your orators, or to any agent of either of them, any claim of ownership of any interest in the said properties, but aver that it came to the knowledge of your orator Hull, some time about the middle of the month of November, A. D. 1905, that one or more creditors of the said company had stated or asserted that the said company owned some interest in the said properties; and that thereafter your orator Hull, on the twenty-eighth day of the month and year last aforesaid commenced an action of ejectment against the said company in the United States Circuit Court for the Southern District of Florida, being the district in which all of said property was situated; that due process of summons was issued from the said court to and due service thereof was duly made upon said company on the sixth day of December, A. D. 1905; that return of such service was duly made by the United States marshal for the said district; that such further proceedings were had in the said action that on the thirteenth day of March, A. D. 1906, a jury rendered a verdict therein in favor of the said Hull, and on the said day the said court rendered its judgment in due and legal form adjudging that the said Hull was the owner of the fee simple title to and had the right of possession of all the lands hereinbefore described and mentioned in the resolution aforesaid, which said judgment was duly recorded upon the records of the said court and still remains in full force and effect.

Eleventh. Your orators aver that the said defendants now assert that by virtue of an alleged decree made and entered in the United States District Court for the District of Massachusetts on the twenty-seventh day of November, A. D. 1905, which said decree purported to adjudge said Port Tampa Company bankrupt, they are the owners of an equitable interest or estate in the said lands and other properties. Your orators aver that the said defendants assert and claim that under such decree the said defendant Arthur E. Burr was, on the twenty-seventh day of December, A. D. 1905, appointed
11 the sole trustee of the estate of the said company in bankruptcy; that the said Burr resigned as such trustee on the twelfth day of March, A. D. 1909; that his resignation was accepted by the said court on said twelfth day of March, and that, after such resignation and the acceptance thereof, the said Burr, Simpson and Edwards were on the same day appointed trustees in the place of the said Burr; and the defendants now assert and claim that at the time of the said adjudication the said company owned an equitable interest or estate in the said lands and other properties; and that, by such adjudication and their said appointment, the title to such interest or estate became vested in the defendants as such trustees.

Twelfth. Your orators aver that true it is that on or about the

twenty-sixth day of March, 1908, the said Burr, claiming as aforesaid and before he resigned as such alleged trustee, brought a suit by bill in equity in the Circuit Court in and for Polk County in the State of Florida against your orators as defendants therein to establish such interest or estate, but that there has been no trial of said suit on the merits, nor had the same been brought to final issues of fact and law before the said resignation.

That on the ninth day of January, A. D. 1912, the defendants herein filed in said State court a bill in equity which they called a supplemental bill of complaint, wherein they aver that said suit was brought by Burr as such trustee in bankruptcy as aforesaid; that Burr resigned as such trustee on March 12, 1909, and in and by the said supplemental bill the plaintiffs therein pray that they may be substituted as complainants in the place and stead of the said Burr in the amended bill filed in the said suit by the said Burr, as trustee; that your orators filed an answer to the said supplemental bill, to part of which issue was joined by a replication and to part of which said answer exceptions were ordered sustained by the said Polk County Circuit Court; that said issues have not been tried and no decree making the defendants as trustees complainants in the said amended bill has been rendered by said court.

That in the said supplemental bill these defendants, as the plaintiffs therein, allege that they are the successors of the said Burr as trustee in bankruptcy of the estate of the said Port Tampa
12 Company, and that they are the trustees of such estate in bankruptcy, under an appointment on the twelfth day of March, A. D. 1909, after the resignation of the said Burr as sole trustee was accepted.

Your orators, in respect to the said bankruptcy proceedings, aver the truth and the facts to be as follows: That the said Port Tampa Company was organized on or about the sixth day of December, A. D. 1904; that it attempted to establish a phosphate mining plant in Polk County, State of Florida, but was unable to do so, and never did complete and equip such a plant; that it never engaged in the business of mining and selling phosphate rock, and never engaged in or transacted any business for which it was organized, other than the abortive effort to establish such a plant; that, being unable to do so, it was unable to accomplish the objects and purposes for which it was organized, and the company could have been speedily and with little expense wound up and dissolved under the laws of the State of Massachusetts had the company so desired; but that, for the unlawful and sinister purpose of pretending to create a trustee under the bankrupt laws of the United States, and of procuring him, on behalf of alleged creditors, to attack the title of your orators to the properties aforesaid, and to unjustly vex and harass them with suits in the courts, the directors and chief executive officers of the said company promoted and initiated the said bankruptcy proceedings and caused a decree to be entered therein which purports to adjudge said company bankrupt, although well knowing, as your orators aver, that there was no justification in fact or law for such proceedings and for such adjudication.

Thirteenth. That on and before the eighth day of November, A. D. 1905, Hiram W. Rowell, William F. Wills, Benjamin L. Emerson, Robert Hamilton and Hayes Lougee were the only directors of the said company, its directorate consisting of five members; that the said Rowell was its president from its organization in December, A. D. 1904; that said Emerson was its treasurer up to September of the year 1905, and from said September the said Wills was its treasurer; that the said Hayes Lougee was one of the original incorporators, and was then, and is now, a practicing lawyer in the city of Boston, State of Massachusetts.

13 Fourteenth. That on the eighth day of November, A. D. 1895, a petition in bankruptcy was filed in this court of bankruptcy, a true copy of which is hereto attached marked "Exhibit A" and hereby made a part of this bill of complaint, to which reference is prayed as often as may be necessary; that a true copy of the subpœna that was issued on the said petition and the return of the service thereof is hereto attached marked "Exhibit B" and hereby made a part of this bill of complaint, to which reference is prayed; that a true copy of an alleged appearance in said court to the said petition by one J. H. Robinson is hereto attached marked "Exhibit C" and hereby made a part of this bill, to which reference is prayed; that the said Port Tampa Company never appeared in said court to the said petition in any manner other than such alleged appearance by the said J. H. Robinson, and that said company did not on or prior to November 27, 1905, or at any other time voluntarily submit itself in said proceeding to the jurisdiction of the said court.

That the allegations in said petition: "That within four months next preceding the date of this petition the said Port Tampa Phosphate Company committed an act of bankruptcy in that it did heretofore, to wit, on or about the ninth day of October A. D. 1905, suffered and permitted, while insolvent as aforesaid, certain creditors to obtain a preference through legal proceedings by process of attachment, and not having at least five days before a sale or final disposition of its property affected by such preference, vacated or discharged such preference," and every part thereof, and the conclusions of law therein contained were and are absolutely untrue in law and in fact, and that those named in said petition and appearing therein as petitioning creditors knew that they were untrue when the said petition was signed and verified, and that your orators are informed and believe and upon such information and belief allege that the said petition was prepared and filed for the purpose and with the intent to deceive this court and to make it believe that an act of bankruptcy had been committed by said company. That your orators are informed and believe and upon such information and belief allege that the only pro-

14 ceeding by attachment that was ever taken against said company was begun at the instance of said petitioning creditors, or some of them, and was controlled by some or by all of them; that no judgment or decree was ever obtained in said proceeding, and that no property owned by or claimed to be owned by the said company

was ever sold or ever advertised to be sold, under and by virtue of any judgment, order, or process of any court prior to the eighth day of November, A. D. 1905; and your orators aver that there never was prior to the day and year aforesaid any property of the said company affected by any preference, and that there never was any "final disposition" of any property of the said company, by, through, or under any process of attachment or any other process of any court, of all of which the said alleged petitioning creditors had knowledge on the day and year aforesaid.

Your orators further aver that each and every of the alleged jurisdictional facts stated in the said petition were untrue and known to be untrue by the said alleged creditors, before said petition was filed, and that the said facts were falsely and fraudulently averred in the said petition, and were fabricated for the purpose of pretending to state a case within the jurisdiction of the said District Court for the State of Massachusetts.

Your orators further aver that in the suit by the petition in bankruptcy aforesaid, in the United States District Court for the State of Massachusetts, the three persons aforesaid who signed and verified the said petition were directors of said Port Tampa Company and constituted a majority of the directorate of the said company; that one of them was its president, and that the said three persons were domini litis of both sides of the said suit, and in fact and in law the said three persons were both the plaintiffs and defendants therein. And your orators aver that, after the said petition was filed, William F. Wills, who was also a director of the said company, claiming to be a creditor thereof to the amount of over eleven thousand dollars ($11,000), joined in the said proceeding brought by the said three other directors; that in the said suit and in all of the proceedings therein there was not an adverse or adversary element prior to the said alleged decree of
15 adjudication, and that by reason thereof the said petition and the said alleged appearance and said alleged decree and all subsequent proceedings therein were mere paper forms, were without legal vitality and were nullities.

Fifteenth. Your orators aver that the said Port Tampa Company never did commit any act of bankruptcy that is specified, defined and prescribed by and under any Bankruptcy Act of the United States of America, and never suffered or permitted any act of bankruptcy to be committed by it.

Sixteenth. And your orators aver that all of the said directors and chief executive officers are chargeable with personal knowledge that the said company had not committed, suffered or permitted to be committed any act of bankruptcy under any Bankrupt Act of the United States prior to November 27, A. D. 1905, and that the attorneys at law and solicitors in chancery who became connected with such bankruptcy proceedings are also chargeable with such knowledge.

Seventeenth. Your orators aver that no jurisdictional fact of an act of bankruptcy is alleged in the said petition marked "Exhibit A," which clearly appears from an inspection thereof, to which

again reference is prayed; that the allegation in the said petition in respect to the principal place of business of the said company being in Boston, State of Massachusetts, was and is untrue in fact; that said company never did any business within the meaning of that word under the Bankrupt Act except in the State of Florida, and that whatever properties the said company owned or pretended to own were in the State of Florida at the time said petition was verified and filed, of all which each of the said directors and executive officers were chargeable with knowledge at the time aforesaid.

Eighteenth. Your orators aver that the said subpœna and the service thereof and return thereon and each of them was illegal, unauthorized and void on its face, which fully appears by an inspection thereof; and that the said appearance by J. H. Robinson was null and void on its face; and that the said J. H. Robinson was never in fact authorized by the said company to enter for it the said appearance.

16 Nineteenth. Your orators aver that on the eighth day of November, 1905, when the said petition was filed, neither the said Rowell, Lougee or Hamilton, three of the said directors who signed and verified under oath the said petition as petitioning creditors, had any reasonable ground to believe that any act of bankruptcy had ever been committed by said company, and had no reasonable ground to believe that in the said petition any act of bankruptcy was alleged upon which any court had jurisdiction to adjudge the said company bankrupt.

Twentieth. That in the said petition so signed and verified under oath by said three directors it was alleged that the said company was insolvent, yet true it is that on the ninth day of December, A. D. 1905, schedules of assets and debts and liabilities of the said company were filed in the said District Court duly verified under oath by said William F. Wills, its treasurer, and then one of its directors, and that in the said schedules it is clearly set forth that the assets of the company therein described were worth one hundred and fifty thousand dollars ($150,000); that the aggregate of the claims of the unsecured creditors of the company was thirty-eight thousand nine hundred and forty-two dollars and ninety cents ($38,942.90) and of secured creditors thirty-two thousand dollars ($32,000), thus showing by such schedules that the assets exceeded the claims of creditors by about eighty thousand dollars ($80,000); that your orators are informed and believe, and upon such information and belief allege, that no change had taken place in the assets of said company between the dates when said petition and said schedules were respectively filed, and that when said petition was verified and filed said petitioning creditors had full knowledge of all of the assets of said company as contained and stated in said schedules. Yet true it is that the directors and officers of the company, with perfect knowledge of the facts hereinbefore stated and hereinafter stated, promoted and prosecuted the said bankruptcy proceedings. But your orators do not know otherwise how or the particular manner of representation of facts by which the said officers misled and induced the said court of bankruptcy to believe

the said company had committed an act of bankruptcy on
17 which a decree of adjudication could be pronounced by the court or that said company was insolvent. But your orators aver that said court was misled and deceived in the premises by the said officers in some manner.

Twenty-first. Your orators aver that in the said bankruptcy proceeding the directors and officers of said company asserted and claimed that they owned unsecured claims against the said company to the amount of about twenty-eight thousand dollars ($28,000), chiefly for money alleged to have been loaned to the said company; that Rowell so claimed to the amount of sixteen thousand dollars ($16,000); Lougee to the amount of three hundred dollars ($300); Hamilton to the amount of two hundred and fifty dollars ($250), and Wills to the amount of eleven thousand, four hundred and sixty-four dollars and forty cents ($11,464.40).

Twenty-second. Your orators aver that they have been informed and believe and on such information and belief allege that a considerable portion of such claims were and are not legal and just debts of the said company; and aver that it is shown by inspecting the record of the said proceedings in bankruptcy that the claims of Rowell and Lougee, two of the said petitioning creditors, were not proven as required by law and have never been allowed, thus leaving only Hamilton as a lawful petitioning creditor whose claim was only two hundred and fifty dollars ($250).

And your orators aver that it clearly appears from the inspection of the said record that no legal proof of the claim of the said Rowell has ever been filed as required by the said Bankrupt Act and rules of the Federal Supreme Court in that behalf adopted. And your orators are informed and believe and on such information and belief allege that the said Rowell and Lougee did not own any just claims against the said company at the time the said petition was filed.

Twenty-third. Your orators state that they are informed and believe and on such information and belief allege that the majority of the stock of the said company at the time of said proceedings stood in the name of the said directors and that they had or asserted
the legal right to vote such stock, and that the holders of
18 a minority of such stock were powerless to defeat such bankrupt proceedings had they desired so to do; that the said directors and officers completely dominated the company and prevented it or any person in its behalf from appearing and defending the said petition and defeating a decree of adjudication or other proceedings therein.

Twenty-fourth. Your orators further show that the said directors and officers concealed from the said court of bankruptcy the facts that the said petitioning creditors were directors, officers and employees of said company and that they could not lawfully be such petitioning creditors; and by their acts and doings hereinbefore stated made it falsely to appear to the said court that they were bona fide creditors of said company and that the said petition was an involuntary petition by such creditors, whereas in truth and in

fact and in legal effect the said petition was a voluntary petition on the part of the company and of its officers and directors, who impersonated and controlled the company, under the false and deceptive guise and color of an involuntary proceeding, the said officers and directors then and there well knowing that voluntary proceedings in bankruptcy by the said company were unlawful and void.

Twenty-fifth. Wherefore your orators insist that by the acts and doings aforesaid, and by the false representations to the said court, and by corruptly concealing from the said court material facts for the purpose of unlawfully procuring the appointment of a trustee in bankruptcy, the said alleged decree of bankruptcy was fraudulently procured by imposing on the said court, and a fraud has been committed on the Bankrupt Act itself, as well as upon the said court.

Twenty-sixth. Your orators further show that the asserted appointment of the defendants as alleged trustees on March 12, 1909, was null and void in this,—that no judge or referee appointed defendants trustees; that in point of fact these defendants claim they were appointed trustees at a meeting of creditors on the twelfth day of March, A. D. 1909, whereas your orators allege the truth and facts to be that the pretended call by the referee for a meeting of creditors on the said 12th of March was for a meeting at ten o'clock a. m. of that day; that said call was signed and issued by the referee on the second day of March, A. D. 1909, at a time when there was not any vacancy in the office of trustee; that the said Burr as such alleged sole trustee did not resign until eleven o'clock a. m. of said twelfth day of March; that the ten days' notice of said meeting was not given by mail to all the creditors as required by law; that the only creditor who attended said meeting was William F. Wills, one of the directors; that there were then ten other creditors who had proven claims; that Wills did not own a bona fide provable claim to the amount of one-half of the claims that had been proven in the cause, and the appointment under which the defendants' claim was made by Wills alone, and no other director attended said meeting or voted thereat by any attorney at law, or by any agent or pretence of any authority so to do.

Your orators show that there was no power or jurisdiction in any creditor or creditors to appoint the defendants trustees at the time the said Wills pretended to appoint them on March 12, A. D. 1909, because at that time there was no vacancy in the office of trustee for the reason that Burr, the alleged sole trustee under his said appointment in December, A. D. 1905, had not at that time resigned, and his resignation at that time had not been accepted by the court, and your orators show that the said defendants did not acquire and do not possess the character of trustees in bankruptcy under and by virtue of their said appointment.

Twenty-seventh. Your orators aver that twenty-three parts or paragraphs of their answer to the said supplemental bill were severally excepted to by the plaintiffs therein and each of the said exceptions was sustained by the order of the said Polk County Circuit Court; that on appeal from the said order the Florida Supreme Court affirmed said order on July 3, 1912; that parts of the said

answer so excepted to set up the defence of want of jurisdiction of the said court of bankruptcy to render any decree of adjudication and that such alleged decree was void on the face of the said proceedings. And the said Supreme Court ruled and announced in its opinion that all such defences were collateral attacks upon
20 the said bankrupt proceedings, which were not permissible, and that said ruling and announcement was in the exact words as follows, to wit: "the assaults made upon the bankruptcy proceedings in the Federal Court of Massachusetts by the answer of the appellants to the supplemental bill of the appellees in the particulars wherein said answer was excepted to by the appellees is simply a collateral attack upon the judgments, orders and proceedings in said bankrupt court that is not permissible either by way of defence to the supplemental bill or to the original bill as amended." And by reason of the said judgment of the Florida courts your orators cannot by way of defence to the said bills of complaint in said courts have and obtain that speedy, adequate and appropriate relief that this court is competent to render upon this original bill of complaint. And your orators fear that the Florida courts will decline to adjudicate as to the character and title of the defendants as trustees and their competency to attack your orators' title to said properties, as herein set forth, upon any answer to the said bills in the said State court.

Twenty-eighth. Your orators submit that, upon the facts hereinbefore set forth, which are conclusively provable to be true by the record of the proceedings of the said court of bankruptcy, if the said Port Tampa Company had any title to any of the aforesaid properties, legal or equitable, at the time of the said alleged decree of adjudication, such title still remains in the said company; that your orators are still liable to be sued by the said company in any court of competent jurisdiction to assert such title, and that a final decree in the Florida State court for or against the defendants as such alleged trustees would not be pleadable in bar of a suit by the said company against your orators to assert such title.

Twenty-ninth. Your orators aver that the said Burr was on the twenty-seventh day of December, A. D. 1905, a member of the bar of the State of Massachusetts, and was then and for some years prior to the said date had been practicing law in Boston, that between the first and twenty-seventh day of December, Burr, as an attorney at law, represented several of the alleged creditors of the Port Tampa Phosphate Company in the proving and filing of their
21 claims; that at a meeting of six creditors of said company held on December 27, 1905, for the purpose of electing a trustee he, the said Burr, in his capacity as an attorney at law represented five of the said creditors whose claims amounted to twenty-two thousand, two hundred and three dollars and sixty-five cents ($22,203.65), and in such capacity voted for and elected himself the trustee at said meeting, and afterwards became and acted as the attorney at law for himself in the said proceedings to promote his personal interests; and that too after he knew the contents of the said petition and that it did not allege any act of bankruptcy.

And your orators aver that these defendants herein and their counsel of record in the said Florida courts were informed of and had knowledge of the contents of the said petition and that it did not allege an essential jurisdictional fact of an act of bankruptcy, and had knowledge of the mode and manner of their alleged appointment as trustees on March 12, 1909, as hereinbefore set forth, and that they had such information and knowledge long before they filed the supplemental bill by reason of and through pleadings by your orators and exhibits to such pleadings filed in the Florida court in the said suit by the said Burr in the month of March, A. D. 1911. And, notwithstanding such knowledge, the defendants are still prosecuting or endeavoring to prosecute the said suits in the Florida courts based solely on the said alleged decree of adjudication, after knowing that such petition does not allege any act of bankruptcy; that no such act was committed by said company, and that such fact was known to the alleged petitioning creditors when said petition was filed. And your orators aver that the said Frank L. Simpson is a member of the bar of the State of Massachusetts and a practicing lawyer in the said State, and has been a practicing lawyer in said State for several years.

Your orators further aver that the said Hayes Lougee, one of the directors of the said company, and one of said petitioning creditors, was a notary public and that Robert Hamilton and William F. Wills, each being a director of the said company, swore to their asserted claims as creditors in the month of December, A. D. 1905, before the said Lougee in his capacity as such notary public; that
22 one George Tebbets, claiming to be the agent of the said Hiram W. Rowell, a director and president of the company, and another of said petitioning creditors, also swore to the asserted claim of the said Rowell before the said Lougee as a notary public on the twenty-eighth day of March, A. D. 1906; that the said Lougee swore to his claim before John G. Robinson, the law partner of the said Lougee, on the sixteenth day of December, A. D. 1905, and that the said John G. Robinson asserted and made proof of a claim against the said company on December 16, 1905, for the sum of one hundred and eighty dollars ($180) for office rent from January 20, 1905, to the date of filing of the said petition, and in his affidavit of proof the said John G. Robinson stated that he was a member of the firm of Lougee & Robinson, all of which appears in the said transcript of record.

Your orators aver that they had no notice or knowledge of the facts herein stated in respect to the invalidity of the bankrupt proceedings until the fourteenth day of March, A. D. 1911, when such facts were discovered by an examination of the transcript of the record of those proceedings; that until said date you orators had assumed that the averments in the bill of complaint by Burr alone in the Florida court with respect to the validity of said bankruptcy proceedings and his appointment as trustee therein were true, and that your orators raised the said objections in said answer to the validity of said proceedings as soon as they were discovered.

To the end that the said defendants may if they can show why

your orators should not have the relief herein below prayed for, and that they may upon their several separate oaths to the best and utmost of their several and respective knowledge, recollection, information and belief full, true and perfect answers make to the several interrogatories hereunder written, as by the attached note they are specially required to answer, and that they may severally be required to answer the remainder and parts of the bill in respect to which they are not interrogated, but not under oath, which as to such parts is hereby waived.

And in view of the premises and in tender consideration thereof, and forasmuch as your orators, are without an adequate
23 remedy at law, may it please this Honorable Court by its interlocutory decree to restrain and enjoin the said defendants and each of them, and each of their attorneys at law and solicitors in chancery, and each and every of their agents and attorneys from asserting or claiming as trustees in bankruptcy in any court or place any right, title or interest in or to any of the properties herein described until the further decree of this court, and to make such interlocutory decree final by the final decree of this court. And may it please the court to grant such other, different and further relief, temporary and final, as to this court may seem just and equitable. And may it please the court to grant the subpœna of the United States of America directed to and commanding the said Arthur E. Burr, Frank L. Simpson and J. Howard Edwards to be and appear before this Honorable Court upon a certain day and under a certain penalty therein to be specified to answer the premises and to stand to and abide such further order and decree as this court may have considered in that behalf.

And your orators will ever pray, etc.

GASTON, SNOW & SALTONSTALL,
Solicitors for the Plaintiffs.

NOTE.—Each of the defendants is required to answer the following interrogatories.

—— ——, *Solicitor.*

First. Whether or not the complainants derived their title to the said properties as stated in clauses designated First to Eighth, inclusive, in the said bill of complaint.

Second. Whether or not the resolution set forth in the clause of the bill designated Ninth was passed by the directors as therein stated.

Third. Whether or not the several exhibits attached to and filed with the bill of complaint are true copies of the originals.

Fourth. Whether or not the matters of fact alleged in clause designated Twentieth of the bill are true.

Fifth. Whether or not the number and names of the di-
24 rectors of the Port Tampa Phosphate Company are correctly stated in the bill, and, if not, how otherwise?

Sixth. Whether or not the said directors owned and controlled in their own names or otherwise a majority of the stock that had

been issued by the said company as stated in the bill, and, if not, how otherwise?

Seventh. State whether or not it is true as alleged in the bill that the said company never committed an act of bankruptcy, and if your answer is that it is not true, state fully and particularly the act of bankruptcy said company did commit and how, when and where it was committed.

Eighth. State whether or not defendants Arthur E. Burr and Frank L. Simpson were practicing lawyers in the State of Massachusetts as stated and at the time stated in the bill.

Ninth. State whether or not the claims of Hayes Lougee and Hiram W. Rowell were never allowed by any referee or other officer as stated in the bill.

Tenth. State whether or not you, the defendants, had knowledge of the contents of the said petition in bankruptcy as stated in the bill, and, if so, when you acquired such knowledge.

Eleventh. State whether or not you or either of you had knowledge of the contents of the subpœna and return thereon set forth in the bill, and, if so, when you acquired such knowledge.

Twelfth. State whether or not the defendants claim they were appointed trustees at a meeting of creditors called for the twelfth day of March, A. D. 1912, at ten o'clock A. M. of that day.

Thirteenth. State whether or not Arthur E. Burr resigned as trustee at eleven o'clock A. M. of the twelfth day of March, A. D. 1909, and whether or not his resignation was accepted.

Fourteenth. State whether or not a letter, postage paid thereon, deposited in the United States mails in Boston, State of Massachusetts, on the second day of March, A. D. 1909, could by due course of the United States mails at that time have been delivered at Bartow, State of Florida, or Lake City, Florida, ten days before ten o'clock A. M. of the tewlfth day of March, A. D. 1909, including the said twelfth day as one of the said ten days.

25 Fifteenth. State whether or not Hayes Lougee was a practicing lawyer as stated in the bill.

Exhibit A.

Creditors' Petition.

To the Honorable Frederic Dodge, Judge of the District Court of the United States for the District of Massachusetts:

The petition of Hiram W. Rowell of Lynn in said District, and Hayes Lougee of Boston in said District, and Robert Hamilton of Boston in said District, all in the State of Massachusetts, respectfully shows:—

That the Port Tampa Phosphate Company, a corporation duly organized under the laws of the State of Massachusetts, and having an usual place of business in Boston in said District of Massachusetts, and engaged principally in mining pursuits, has for the greater portion of six months next preceding the date of filing this

petition, had its principal place of business at Boston, in the County of Suffolk, and State and District aforesaid and owes debts to the amount of $1000.

That your petitioners are creditors of said Port Tampa Phosphate Company, having provable claims amounting in the aggregate, in excess of securities held by them to the sum of $500. That the nature and amount of your petitioners' claims are as follows:—

Hiram W. Rowell, note	$16000.00/100
Hayes Lougee, money loaned	300.00/100
Robert Hamilton, money loaned	250.00/100

And your petitioners further represent that said Port Tampa Phosphate Company is insolvent, and that within four months next preceding the date of this petition the said Port Tampa Phosphate Company committed an act of bankruptcy, in that it *did* heretofore, to-wit, on or about the ninth day of October, A. D. 1905, suffered and permitted, while insolvent as aforesaid, certain creditors to obtain a preference through legal proceeding, by process of attachment, and not having at least five days before a sale or final disposition of its property effected by such preference, vacated or discharged such preference.

26 Wherefore your petitioners pray that service of this petition, with a subpœna, may be made upon said Port Tampa Phosphate Company, as provided in the acts of Congress relating to bankruptcy, and that he may be adjudged by the court to be a bankrupt within the purview of said acts.

HIRAM W. ROWELL,
HAYES LOUGEE,
ROBERT HAMILTON,
Petitioners.

CHARLES J. MOYES, *Attorney.*

Address Old South Bldg., Boston, Mass.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

We, Hiram W. Rowell, Hayes Lougee and Robert Hamilton, being three of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are true.

HIRAM W. ROWELL,
HAYES LOUGEE,
ROBERT HAMILTON,
Petitioners.

Before me, Charles R. Tapley, this eighth day of November, 1905.

CHARLES R. TAPLEY,
Justice of the Peace.

EXHIBIT B.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

To Port Tampa Phosphate Company, a corporation duly organized under the laws of the State of Massachusetts, and having its principal place of business at Boston in said District, Greeting:

For certain causes, offered before the District Court of the United States of America, within and for the District of Massachusetts as a Court of Bankruptcy, we command and strictly enjoin you, laying all other matters aside, and notwithstanding any excuse, that you personally appear before our said District Court to be
27 holden at Boston, in said District, on the 20th day of November, A. D. 1905, to answer to a petition filed by Hiram W. Rowell et al., in our said Court, praying that you may be adjudged a bankrupt; and to do further and receive that which our said District Court shall consider in this behalf. And this you are in no wise to omit, under the pains and penalties of what may befall thereon.

Witness, the Honorable Frederic Dodge, Judge of the said Court and the seal thereof, at Boston, this 8th day of November, A. D. 1905.

[SEAL.] MARY E. PRENDERGAST,
Deputy Clerk.

UNITED STATES OF AMERICA,
Massachusetts District, ss:

BOSTON, *November 14th*, 1905.

I hereby certify that I this day at Boston served the within precept upon the within named defendant corporation by giving in hand to Benjamin L. Emerson, Clerk of said corporation, a true and attested copy of this precept and a duplicate of petition now on file in Clerk- office of the Court of Bankruptcy.

J. H. WATERS,
Deputy U. S. Marshal.

EXHIBIT C.

No. 10748.

United States District Court.

In Bankruptcy.

In Re PORT TAMPA PHOSPHATE CO., Bankrupt.

In the above cause I appear for Port Tampa Phosphate Co.
(Sign.) J. H. ROBINSON.

Address 54 Devonshire St. Boston.

Filed in Clerk's office, United States District Court, Mass. Dist., Nov. 20, 1905, 12 m.

On the same day, the following Agreement as to Amended
28 Bill, etc., is filed:—

Agreement as to Amended Bill, etc.

[Filed December 19, 1912.]

In the above-entitled cause it is agreed that the amended bill filed this day may be submitted for the original bill on file, and that the demurrer of the respondents, already on file, may stand as a demurrer to the substituted bill.

GASTON, SNOW & SALTONSTALL,
Solicitors for Cmplainant.
ARTHUR E. BURR,
Solicitors for Respondents.

Also on the same day, this cause is set down for hearing on demurrer and is fully heard by the court, the Honorable Frederic Dodge, Circuit Judge, duly assigned to hold said District Court, sitting, and on the twenty-fifth day of January, A. D. 1913, an opinion of the court is announced, sustaining said demurrer.

On the twenty-fourth day of February, A. D. 1912, the following Motion to Amend Bill of Complaint by adding exhibit thereto is filed:—

Motion to Amend Bill of Complaint by Adding Exhibit.

[Filed February 24, 1912.]

Motion.

Now come the complainants in the above-entitled cause of action and move that they may amend their bill of complaint by adding thereto the record of the case of Joseph Hull v. N. B. Charles et al., in the Circuit Court of the United States, Southern District of Florida, which is hereto annexed, marked "Exhibit A."

By their Solicitors,

GASTON, SNOW & SALTONSTALL.
FRANCIS W. BACON.

29 EXHIBIT A.

In the Circuit Court of the United States, Southern District of Florida.

Ejectment.

JOSEPH HULL, Who is a Citizen and Resident of the State of Georgia, Plaintiff,

v.

N. B. CHILDS, Who is a Citizen and Resident of the State of Florida, and of the Southern District of Florida, and the Port Tampa Phosphate Company, a Corporation Organized and Existing under the Laws of the State of Massachusetts and Doing Business in the State of Florida and the Southern District of Florida, Defendants.

To the Clerk of said Court:—

Please to issue summons ad respondendum directed to N. B. Childs and the Port Tampa Phosphate Company, returnable according to law, at Tampa.

BISBEE & BEDELL,
WILSON & WILSON,
Atty's for Plaintiff.

Description of Property Sued for in the Above Action.

The property sued for in the above action is described as follows:—

The South half; and the south half of the northeast quarter and the southeast quarter of the northwest quarter of section thirty-four (34), in township twenty-nine (29) south range twenty-three (23) east, Polk County, Florida, and all the mills, phosphate plants and buildings of every description located thereon, and all the property of every description and kind being a part of or attached to any of the said plants and buildings: the said above described lands containing four hundred and forty (440) acres more or less.

BISBEE & BEDELL,
WILSON & WILSON,
Atty's for Plaintiff.

30 Endorsed: "In the Circuit Court of the United States, Southern District of Florida. Joseph Hull plaintiff vs. N. B. Childs and the Port Tampa Phosphate Company, Defendants. Præcipe for Summons ad Res. Filed this 28th day of November A. D. 1905. E. O. Locke, Clerk by H. L. Crane Deputy Clerk Bisbee & Bedell Attys. for Plaintiff."

United States Circuit Court, Fifth Circuit, Southern District of Florida.

The President of the United States to the Marshal of the Southern District of Florida, Greeting:

You are hereby commanded to summon N. B. Childs a citizen and resident of the State of Florida, and the Port Tampa Phosphate Company a corporation organized and existing under the laws of the State of Massachusetts and doing business in the State of Florida, Defendants if they may be found in your District, to be and appear before the Circuit Court of the United States, Fifth Circuit and Southern District of Florida, at the Rule Day of said Court, to be held at the Clerk's office in the City of Tampa, on the first Monday of January next to answer unto Joseph Hull, who is a citizen and resident of the State of Georgia plaintiff.

Description of Property Sued for in the Above Action.

The property sued for in the above action is described as follows: —The south half; and the south half of the northeast quarter; and the southeast quarter of the northwest quarter of section thirty-four (34) in township twenty-nine (29) south range twenty-three (23) east, Polk County, Florida, and all the mills, phosphate plants and buildings of every description located thereon and all the property of every description and kind, being a part of or attached to any of the said phosphate plants and buildings; the said above described lands containing four hundred and forty (440) acres more or less in said Court on a plea of Ejectment wherein the plaintiff claims damages to the amount of Ten thousand ($10,000.00) dollars. And have you then and there this writ.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of this
31 Court at the City of Tampa, in said District, this 28th day of November, A. D. 1905.

[SEAL.]

E. O. LOCKE, *Clerk*,
By L. H. CRANE,
Deputy Clerk.

BISBEE & BEDELL,
WILSON & WILSON,
Plaintiff's Attorneys.

The foregoing summons is endorsed as follows:—

"No. 3. United States Circuit Court Southern District of Florida. Joseph Hull vs. N. C. Childs, and the Port Tampa Phosphate Company. Summons Issued November 28th 1905. Returnable January 1st, 1906. Filed Dec. 18, 1905. E. O. Locke, Clerk."

Also:

"Received this writ at Tampa, Florida on the 30th day of November 1905 and executed the same, by exhibiting the original and delivering a true copy, thereof to the within named N. B. Childs, one mile northwest from Mulberry in Polk County Florida; as the

person having the property herein described in his possession; and as the agent of the Port Tampa Phosphate Company. Said service was made on the 6th day of December 1905. The President, Vice-President, Secretary, Treasurer, Directors, and all other officers of, said Port Tampa Phosphate Co. to the best of my knowledge, and information being out of the said Southern District of Florida.

JOHN F. HORR,
U. S. Marshal, Southern District of Florida,
By JOHN R. WILLIAMS,
Deputy U. S. Marshal So. Dist. of Fla."

Declaration.

In the Circuit Court of the United States, Southern District of Florida.

JOSEPH HULL, Plaintiff,
vs.
N. B. CHILDS and THE PORT TAMPA PHOSPHATE COMPANY, Defendants.

Ejectment. Damages $10,000.00.

Joseph Hull, who is a citizen of the State of Georgia, residing in Savannah, in said State, sues N. B. Childs who is a citizen of
32 the State of Florida and a resident of the Southern District of Florida, and the Port Tampa Phosphate Company, which is a corporation organized and existing under the laws of the State of Massachusetts and doing business in the State of Florida and the Southern District of Florida, in an action of ejectment, Because the defendants are in possession of certain lands situate, lying and being in the said Southern District of Florida known and described as follows: to-wit:—

The south half; and the south half of the northeast quarter; and the southeast quarter of the northwest quarter of section thirty-four (34) in township twenty-nine (29) south range twenty-three (23) east, Polk County, Florida and all the mills, phosphate plants and buildings of every description located thereon, and all the property of every description and kind being a part of or attached to any of the said phosphate plants and buildings and lands; the said above described lands containing four hundred and forty (440) acres more or less, to which said plaintiff claims title. And the defendants have received the profits of the said lands since the 9th day of October A. D. 1905, of a yearly value of ten thousand dollars, and refuse to deliver possession of the said lands to the plaintiff or to pay the profits thereof. And plaintiff claims possession and damages to the amount of $1,000.00.

BISBEE & BEDELL,
WILSON & WILSON,
For Plaintiff.

Endorsed: "In the Circuit Court of the United States, Southern District of Florida. Joseph Hull, Plaintiff, vs. N. B. Childs, and the Port Tampa Phosphate Company, Defendants. Declaration. Filed this 28th day of November A. D. 1905, E. O. Locke, Clerk, By H. L. Crane Deputy Clerk. Bisbee & Bedell, Attys. for Plaintiff.

33 *Verdict.*

In the Circuit Court of the United States, Southern District of Florida.

JOSEPH HULL, Plaintiff,
vs.
N. B. CHILDS and THE PORT TAMPA PHOSPHATE COMPANY, a Corporation, Defendant.

We, the Jury find the plaintiff Joseph Hull to have the fee simple title and right of possession in and to the following described lands situate, lying and being in the Southern District of Florida, known and described as follows, to-wit:—

The South half and the south half of the northeast quarter and the southeast quarter of the northwest quarter of section thirty-four in township twenty-nine south range twenty-three east in Polk County, Florida and all the mills, phosphate plants and buildings of every description located thereon and all the property of every description and kind being a part of or attached to any of the said phosphate plants and buildings and lands; the said above described lands containing four hundred and forty acres more or less.

G. W. McCLINTOCK, *Foreman.*

Endorsed: "U. S. Circuit Court. Southern District of Fla. Joseph Hull vs. N. B. Childs and Port Tampa Phosphate Co. Verdict. Filed this 13th day of March, A. D. 1906. E. O. Locke, Clerk, by H. L. Crane, Deputy Clerk."

In the Circuit Court of the United States, Southern District of Florida.

JOSEPH HULL, Plaintiff,
vs.
N. B. CHILDS and THE PORT TAMPA PHOSPHATE COMPANY, a Corporation Organized and Existing under the Laws of the State of Massachusetts, Defendants.

And now on this day comes the plaintiff Joseph Hull by his attorneys, and this cause is called for trial and no one appearing in behalf of the defendants or either of them, a jury of twelve
34 men qualified to act as jurors in this cause, and called and sworn to try the issues submitted to them in said cause according to the testimony and the law as given to them in charge by the Court.

And having been charged by the Court retire to consider of their verdict and now upon their oath say:—

"We the jury find the plaintiff Joseph Hull to have the fee simple title and right of possession in and to the following described lands, situate, lying and being in the Southern District of Florida, known and described as follows to-wit: The South half and the South half of the Northeast quarter and Southeast quarter of the Northwest quarter of Section thirty-four in Township Twenty-nine South Range Twenty-three East in Polk County, Florida, and all the mills, phosphate plants, and buildings of every description located thereon and all the property of every description and kind being a part of or attached to any of the said phosphate plants and buildings and lands; the said above described lands containing four hundred and forty acres more or less.

(Signed) G. W. McCLINTOCK, *Foreman.*

Which by order of the Court is here recorded;

And it is thereupon considered by the Court that the plaintiff, Joseph Hull is entitled to have and recover of and from the defendants N. B. Childs and the Port Tampa Phosphate Company, a corporation organized and existing under the laws of the State of Massachusetts, the fee simple title and right of possession of in and to the following described lands, situate lying and being in the Southern District of Florida known and described as follows, to-wit:—

The south half and the south half of the northeast quarter and the southeast quarter of the northwest quarter of Section thirty-four in township twenty-nine south, range twenty-three east in Polk County, Florida, and all the mills, phosphate plants and buildings of every description and kind being a part of or attached to any of the said phosphate plants and buildings and lands, the above described lands containing Four Hundred and Forty (440) acres more or less, together with his costs, which are hereby taxed at Thirty Six — and fifty-five cents, for which let execution issue.

March 13, 1906.

Entered in Minutes on pages 558 559 & 560, Tampa.

THE UNITED STATES OF AMERICA,
Southern District of Florida, ss:

I, E. O. Locke, Clerk of the District Court of the United States, within and for the Southern District of Florida do hereby certify that the foregoing *are* a true and correct transcript of the record of the judgment in the above entitled cause, as same appears from the files and records of the late Circuit Court of the United States for the District aforesaid, the foregoing pages numbered from one to nine.

In testimony whereof I have hereunto set my hand and affixed

the seal of said District Court, this 23d day of August A. D. 1912, at Tampa, Florida.

[SEAL.]

E. O. LOCKE, *Clerk*,
By H. L. CRANE,
Deputy Clerk U. S. District Court.

On the same day, the foregoing motion to amend bill of complaint is allowed by the court, the Honorable Frederic Dodge, Circuit Judge as aforesaid, sitting, and it is ordered that the demurrer, filed October 15, 1912, apply to bill of complaint as amended.

Also on the same day, the following Final Decree is entered:—

Final Decree.

FEBRUARY 24, 1913.

DODGE, *J.*:

This cause came on to be heard at this term upon the demurrer to the plaintiffs' bill as amended February 24, 1913, and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged and decreed, that the demurrer be and it hereby is sustained, and that the bill be and it hereby is dismissed, with costs to be taxed by the clerk.

By the Court,

CHARLES K. DARLING, *Clerk.*

36 From the foregoing final decree, the complainants claim an appeal to the United States Circuit Court of Appeals for the First Circuit, and give good and sufficient security that they will prosecute their appeal to effect and answer all damages and costs if they fail to make their plea good, and said appeal is allowed.

A true record:
Attest:

CHARLES K. DARLING, *Clerk.*

Opinion of the Court on Demurrer.

January 25, 1913.

DODGE, *J.*:

According to the records of this court, in bankruptcy, the defendants are trustees in bankruptcy of the Port Tampa Phosphate Company, adjudged bankrupt by this court on November 27, 1905. The number of the case on the bankruptcy docket is 10,748. From the records it also appears that the defendant Burr was appointed sole trustee of the bankrupt estate December 27, 1905, that he resigned March 12, 1909, and that on the same day he, with the other defendants Simpson and Edwards, were appointed trustees in his place, also that they have ever since continued to be and now are trustees, the estate never having been closed nor the trustees discharged.

The plaintiffs in the present suit allege in their bill that they are defendants in a suit in equity begun March 26, 1908, by Burr, as sole trustee, in the Circuit Court for Polk County, Florida, and that in that suit Burr, Simpson and Edwards have asked to be substituted as complainants in place of Burr alone by a supplementary bill filed January 9, 1912. The plaintiffs further allege that they have answered the supplementary bill in the Florida court and that issues raised by their answer and a replication are pending and undetermined.

The relief which the plaintiffs ask is an injunction against Burr, Simpson and Edwards, forbidding them to assert or claim, as trustees in bankruptcy, in any court or place, any right, title or interest in or to any of certain properties which the bill de-
37 scribes. These properties appear from the bill to be lands and machinery in Polk County, Florida, wherein the trustees, in the Florida suit referred to, assert an interest belonging to the bankrupt estate, but in which the plaintiffs in the present suit claim that no person except themselves has any interest.

The ground asserted in the bill for asking the relief prayed for is, that the bankruptcy adjudication and all proceedings under it are void and the defendants are assuming to act as trustees without right.

There is no want of jurisdiction apparent from the record of the bankruptcy proceedings. The petition filed November 8, 1905, against the Port Tampa Phosphate Company, was signed and sworn to by three persons alleging themselves creditors of that company for amounts aggregating more than $500. It alleged the company to be a Massachusetts corporation engaging principally in mining pursuits, and having had its principal place of business in Boston for the greater part of the preceding six months. It alleged the company's insolvency and the commission by it of an act of bankruptcy, in that on or about October 9, 1905, it "suffered and permitted, while insolvent as aforesaid, certain creditors to obtain a preference through legal proceedings by process of attachment, and not having at least five days before a sale or final disposition of its property effected by such preference, vacated or discharged such preference". A subpœna, proper in form, returnable November 20, 1905, duly issued and returned, shows by the return upon it due service on the alleged bankrupt. On the return day an appearance for the company, signed by J. H. Robinson, was entered. It is neither alleged nor suggested that he was not duly qualified so far as the requirements of General Order IV are concerned, and at any rate schedules were later filed on behalf of the company as required by Section 7*a* (8) of the Bankruptcy Act. See Re Kindt, 98 F. R. 867. It is said that the allegation charging an act of bankruptcy was not specific enough. Had this objection been raised at the time, the petition might have been dismissed unless amended. Re Sig. H. Rosenblatt, 193 F. R. 638. Followed as it was, how-
ever, by appearance and adjudication without objection, it
38 cannot now be said to disclose any want of jurisdiction for that reason. The parties and subject-matter being thus

within the jurisdiction of the court, so far as the record shows, the court's jurisdiction to determine the further questions upon which its power to adjudicate depended cannot be questioned upon the record itself. These questions were, whether the alleged bankrupt was insolvent, whether it had committed an act of bankruptcy alleged and whether the petitioning creditors had provable claims to the requisite amount. Nor is there anything in the record to contradict the presumption that the court rightly determined all such questions when it ordered adjudication. It is alleged that the schedules later filed show the alleged bankrupt's assets to have exceeded its liabilities. But the schedules bind no one but the bankrupt and do not purport to set forth any estimates of values except the bankrupt's. It is alleged that the claims of two of the petitioning creditors have not been proved or allowed in the proceedings. But from this, if it be the fact, no further result follows than the loss of their right to participate in the proceedings under the adjudication, or in dividends. There is nothing in the record, therefore, which raises such an objection to its jurisdiction in bankruptcy as the court must consider, though suggested by a stranger and not by a party to the proceedings.

The adjudication is void, according to the plaintiff's bill, because procured by fraud. The allegations charging fraud may be summarized as follows—

The Port Tampa Phosphate Company's principal place of business was not in Boston, and it did no business except in Florida.

It was not insolvent.

It never committed the act of bankruptcy alleged, nor any act of bankruptcy.

Rowell, Lougee and Hamilton, the three petitioning creditors, and Wills, who afterward joined in the petition as a creditor, were four out of the five directors of the company,—Rowell being president and Wills treasurer.

They knew the company was solvent and had committed no act of bankruptcy.

39 The claims they asserted against it were, to their knowledge, not just debts of the company.

Being the company's officers and directors, they nevertheless promoted the bankruptcy proceedings for the purpose of "pretending to create" a bankruptcy trustee and "procuring" the trustee "to attack" the plaintiff's title to the properties.

The petition was prepared and filed for the purpose and with the intent of deceiving the court, and making it believe (contrary to the fact) that the company had committed an act of bankruptcy.

The jurisdictional facts alleged were "falsely and fraudulently averred" and "fabricated for the purpose of pretending to state a case within the jurisdiction" of the court.

The petitioning creditors and Wills controlled both sides of the litigation through their ownership of a majority of the company's stock.

J. H. Robinson was never authorized to appear for or represent the company.

Though falsely made to appear as an involuntary petition, the petition was in fact voluntary on the part of the company, its officers and directors.

If, as here, no want of jurisdiction over the parties or subject-matter appears from the record and the decree is not void in form, it cannot be collaterally attacked and can only be assailed by a direct proceeding in a competent court. New Lamp &c. Co. v. Brass &c. Co., 91 U. S. 656, 662. Graham v. Boston &c. Co., 118 U. S. 161, 179. The plaintiffs say that this is such a proceeding. Regarded in that light, their bill seems to me defective in the following respects:—

In the first place, no right or interest of the plaintiffs appears by it to be so prejudiced by the adjudication as to entitle them to equitable relief. The bankruptcy proceedings and the adjudication concern only the bankrupt and its creditors. It makes no difference to the plaintiffs whether the claim to the Florida properties is asserted by the bankrupt itself or by its trustee or trustees. The plaintiffs allege in their bill that a final decree in the Florida suit will not bar a suit asserting a claim to the properties on behalf of the bankrupt itself. This, however, is a mere conclusion of law, and, of course, not admitted for any purpose by the demurrer. Fogg v. Blair, 139 U. S. 118, 127; Kent v. Lake Superior &c. Co., 144 U. S. 75, 91. It is in my opinion an unsound conclusion in view of the facts alleged. Neither the bankrupt nor its creditors have ever questioned the adjudication, they are therefore bound by it, and under it the trustees are in the bankrupt's place so far as any claim which it could assert to these properties is concerned. The plaintiffs, therefore, have only to prove, in the suit pending in Florida, that their interests are, as they allege, exclusive of any other, so that the bankrupt could have had no interest in the properties, and they have finally disposed of the trustees' claim. That it may be for their adavantage to escape the necessity of making such proof in the Florida suit, I cannot regard as sufficient to establish the claim to equitable relief here. The controversy regarding the Florida properties can presumably be better determined by the Florida court than by this court.

In the next place, the only defendants named in the bill are the bankruptcy trustees. It is not alleged that they were parties to the bankruptcy proceedings, nor that they participated in the fraud whereby the adjudication is said to have been procured. Neither the bankrupt, nor any of its officers charged with participation in the fraud alleged, nor any of its creditors are made defendants. But in an equity suit for relief of this kind the parties to the suit wherein the judgment or decree was entered are indispensable parties. Harwood v. Railroad Co., 17 Wall., 78 Ralston v. Sharon, 51 F. R. 702, 712. Johnson v. Hunter, 127 F. R. 219 221. I am wholly unable to believe that bankruptcy trustees, charged by the court with the duty of collecting and distributing the assets of their estate, can be called upon by themselves to disprove an alleged fraud not committed by them in obtaining the adjudication under which they or their predecessor have been acting for several years.

The above grounds I consider quite sufficient to require the sustaining of this demurrer, without discussing any of the other grounds upon which the defendants rely. This court, in
41 equity, would in any case be slow to hold the bankruptcy adjudication invalid and thus disturb rights which have been for so long a time accruing under it while it remained unquestioned. It would be still more reluctant to hold the adjudication void for the purposes of this case, leaving it still in force on the record as regards everybody affected by it and not a party to this proceeding.

Certain irregularities in the appointment of the trustee or trustees are alleged, but these seem to me of no consequence whatever; particularly if, is I think, the adjudication cannot be attacked in this suit.

The demurrer is therefore sustained.

Petition for Appeal.

[Filed March 4, 1913.]

Come now Joseph Hull, the Prairie Pebble Phosphate Company and the Savannah Trust Company, the complainants in the above-entitled cause, by Gaston, Snow & Saltonstall, their solicitors, and appeal from the decree dismissing the complainants' bill of complaint in the said cause to the United States Circuit Court of Appeals for the First Circuit. And the complainants, having filed their assignment of errors on this appeal, now pray that said appeal be allowed, and that the said decree may be reversed. And will ever pray, etc.

GASTON, SNOW & SALTONSTALL,
FRANCIS W. BACON,
Solicitors for Plaintiffs.

Assignment of Errors.

[Filed March 4, 1913.]

Come now the plaintiffs by Gaston, Snow & Saltonstall, their solicitors, and upon their appeal from the final decree dismissing bill of complaint in said cause to the United States Circuit Court of Appeals for the First Circuit, file assignments of errors as follows:

A. The court below erred in sustaining the demurrer to the
42 whole bill and in rendering a decree dismissing the amended bill of complaint.

The errors more specifically stated, as appears from the bill and the opinion of the court below, are as follows:

First. The paragraphs, or sections, of the bill of complaint numbered one to tenth, inclusive, state facts entitling the plaintiff the Prairie Pebble Phosphate Company to a decree quieting title

and removing and preventing clouds on its title to the real estate involved even though the defendants are the trustees, as they assert, under a valid decree of adjudication. And the court below ignored this branch of the cause to plaintiff's prejudice.

Second. Section numbered ten of the bill sets up a judgment in ejectment against the Port Tampa Phosphate Company by a Federal court, adjudicating that Joseph Hull, the said Pebble company's grantor, owned a fee simple title to the real estate involved, and was entitled to the possession thereof. Said judgment concluded the said Port Tampa Phosphate Company and all trustees of its estate claiming under it and in privity with it.

Sections two to nine, inclusive, of the bill show that the plaintiffs have been in possession of the said real estate since about May, A. D. 1905. See sections third and fourth of bill (Rec. p. 7), and section ninth shows that such possession is fortified by a valid Federal judgment in an action of ejectment against the Port Tampa Phosphate Company. Wherefore, the court below erred in not overruling the demurrer to the plaintiffs' prejudice.

Third. Sections of the bill numbered eleven to eighteen, inclusive, and especially section fourteen and Exhibit A, being a copy of the petition in bankruptcy, and therein made a part of the bill, challenge the jurisdiction of the court below as a court of bankruptcy to render a decree adjudging the Port Tampa Phosphate Company a bankrupt, on the ground that such jurisdiction did not affirmatively appear upon the face of the said petition and record of the proceedings in bankruptcy, and in that the jurisdictional fact of an act of bankruptcy was not alleged in the said petition, and it did appear upon the face of said petition that an act of bankruptcy is not averred therein. In such case an act of bankruptcy is
43 the subject-matter of the suit in bankruptcy, and the trial court erred by its holding that said court, as a court of bankruptcy, did acquire by the averments in the petition jurisdiction of the subject-matter of said suit.

Fourth. Section of the bill numbered fourteen and Exhibit B, therein made a part of the bill, and section eighteenth of the bill challenged the jurisdiction of said court, as a court of bankruptcy, of the person of the Port Tampa Phosphate Company on the several grounds,—(A) That the paper purporting to be a process of subpœna issued from said court to the said company was void on its face, because said subpœna is signed by "Mary E. Prendergast, Deputy Clerk," no name of any clerk of the said court appearing in the said subpœna. (B) And on the ground that the return of service on the said paper, called therein "a precept," is void on its face, because it is signed by one calling himself "J. H. Waters, Deputy U. S. Marshal," the name of the United States Marshal for the District of Massachusetts not appearing in or upon the said return, nor in the record. And it not appearing from the said return or record that the said "precept" ever went into the hands possession, or control of the said marshal; and it not even appearing from the record that "J. H. Waters" was a Deputy Marshal, except his own assertion. And the trial court erred in its ruling

that "a subpœna proper in form * * * was issued," meaning thereby that such paper was a valid subpœna. And the court erred in the words of its opinion as follows: "and returned shows by the return upon it due service on the alleged bankrupt."

Fifth. Section fourteenth of the bill and Exhibit C therein, made a part of the bill (Rec. p. 27), containing the words following: "In the above cause I appear for Port Tampa Phosphate Co., J. H. Robinson," challenged the validity of such a paper as an appearance by the said company, because it does not purport to be an appearance by the said company, but the act of an irresponsible individual, and the voluntary act of someone calling himself "J. H. Robinson," it not appearing that he was an attorney at law, or that he had any authority to appear for said company.

The trial judge said in his opinion: "It is neither alleged
44 nor suggested that he was not qualified as far as the requirements of General Order IV are concerned, and at any rate schedules were later filed on behalf of the company as required by Section 7*a* (8) of the Bankrupt Act," thereby drawing the inference that such an appearance was an authorized appearance by the said company which is error; and drawing the inference if such an appearance was not binding on the company, that the filing of the schedules was an appearance by the company. This was error, for the section twenty of the bill avers that the schedules were sworn to and filed December 9, A. D. 1905, twelve days after the alleged adjudication, which could not validate a prior void adjudication for want of jurisdiction of the person at the time it was rendered.

Direct Attacks.

Sixth. Section eighteenth of the bill avers that J. H. Robinson was never "authorized by the said company to enter for it the said appearance." (Rec. p. 15.) This being a direct attack upon the jurisdiction of the person, the trial judge was not at liberty to ignore the said averment, which he did ignore. This is error. Such unauthorized appearance was a part of the scheme of fraud stated in the bill, for the purpose of curing a void service of an illegal subpœna, and not an appearance for the purpose of affording the Port Tampa Phosphate Company in its corporate capacity an opportunity to defend the petition, which by the effect of the conspiracy to obtain an adjudication the company would not have.

Seventh. Sections numbered twelve to twenty-six, inclusive, of the bill, to which sections for brevity reference is prayed and made a part of this assignment as fully as if herein set out in hæc verba, allege facts establishing that the Port Tampa Phosphate Company never committed an act of bankruptcy. (Sections 15 and 16, Rec. p. 15.) That its place of business was in Florida; that all its assets were in Florida; that on the claims of the petitioning creditors it was not insolvent; that every material averment of jurisdictional facts in the petition was false and known to be false when made by the petitioning creditors; and that such jurisdictional facts were

fabricated with intent to state a case of jurisdiction where
45 none in fact existed, and that all the proceedings in the court of bankruptcy were mere paper forms, and null and void; and that the alleged adjudication was procured by flagrant frauds. And that the suit in bankruptcy was collusive between alleged creditors and the directors of the company; that both sides of the suit were controlled and dominated by the petitioning creditors, they being directors, there being no adversary element in it. And that the apparent involuntary proceedings were in the eye of the law voluntary proceedings by the directors of the company, and the company itself, and therefore void.

Upon such averments the trial judge ruled that no attack could be made in this suit upon the title of defendants as asserted trustees, on the ground that the alleged adjudication was obtained by fraud and collusion. This is error.

Eighth. The trial judge suggests that this bill is a collateral attack on the bankruptcy proceedings. (See opinion, Rec. p. 39.) This is error, and such a view should have had no influence on the decision of the court.

Ninth. The learned trial judge (Rec. p. 39) rules that regarding the bill as a direct attack it cannot be maintained. This is error.

The reasons he assigned in his opinion why such an attack cannot be maintained are substantially as follows, and are erroneous:—

A. That no right or interest of plaintiffs is "so prejudiced by the adjudication as to entitle them to equitable relief." (Rec. p. 39.)

B. That it is immaterial whether "the claim to the Florida properties is asserted by the bankrupt itself, or by its trustee or trustees." This is error in this,—(A) It assumes that the plaintiffs can have no different defence to the merits to a suit by the company than to a suit by the defendants as trustees. This is an unwarranted assumption. The Federal judgment in ejectment would bar any suit by the company. If admitted that such judgment bars any suit by these alleged trustees, then plaintiffs are entitled to the relief prayed for to quiet their title, etc.

Tenth. The trial judge in his opinion says: "It is alleged
46 that the claims of two of the petitioning creditors have not been proven or allowed * * * but from this * * * no further result follows than the loss of their right * * * in dividends." But section twenty-two of the bill not only makes that allegation, but it further alleges that Rowell and Lougee, two of the petitioning creditors, "did not own any just claims against the said company at the time the said petition was filed." As this latter averment is in the same section of the bill as that quoted by the judge it was error to ignore and not give effect to such latter averment, the truth of which was admitted by the demurrer. Moreover, this averment that two of the petitioning creditors did not own provable claims is a part of the elements of the fraudulent proceedings, which the learned judge omits from his summary in his opinion of the constituent elements of the fraud perpetrated. (See opinion, Rec. p. 38.)

Eleventh. The trial judge in his opinion declares: "The con-

troversy regarding the Florida properties can presumably be better determined by the Florida court than by this court." This is error.

Twelfth. The court erred in ruling that there was a defect in the parties defendant, and that the parties to the suit in the bankrupt court, where the decree was fraudulently obtained, should be made defendants and are indispensable parties.

Thirteenth. The court erred in deciding the facts stated in the twenty-sixth section of the bill respecting the appointment of defendants as trustees only showed irregularities, whereas they show that in law such appointment was void.

Wherefore, appellants pray that the decree dismissing the bill be reversed.

By their Attorneys,

GASTON, SNOW & SALTONSTALL.
FRANCIS W. BACON.

47 *Bond on Appeal.*

[Filed and Approved March 5, 1913.]

Bond No. SX—1966.

Know all men by these presents, that we, Joseph Hull, Prairie Pebble Phosphate Company and Savannah Trust Company and Royal Indemnity Company of New York City, New York, are held and firmly bound unto Arthur E. Burr, Frank L. Simpson and J. Howard Edwards claiming as trustees of the estate of the Port Tampa Phosphate Company in bankruptcy in the sum of Five Thousand Dollars, for the payment whereof well and truly to be made we bind ourselves, our heirs, executors and administrators, and successors and assigns jointly and severally firmly by these presents.

Witness our hands and seals on this the third day of March, A. D. 1913.

The condition of the foregoing obligation is such that whereas the said Joseph Hull, Prairie Pebble Phosphate Company and Savannah Trust Company are about to enter and institute an appeal in the United States Circuit Court of Appeals for the First Circuit from the decree of the District Court of the United States for the District of Massachusetts entered on the twenty-fourth day of February, A. D. 1913, in a certain cause therein pending wherein the above named Joseph Hull, Prairie Pebble Phosphate Company and Savannah Trust Company are plaintiffs and the said Arthur E. Burr, Frank L. Simpson and J. Howard Edwards are defendants as trustees of the estate of the Port Tampa Phosphate Company in bankruptcy. Now, therefore, if the said Joseph Hull, Prairie Pebble Phosphate Company and Savannah Trust Company shall prosecute their said appeal to effect, and if they fail to make their plea good shall answer all

costs and damages, then this obligation shall be null and void else shall remain in full force and effect.

JOSEPH HULL. [SEAL.]
PRAIRIE PEBBLE PHOSPHATE CO.,
[SEAL.] By JOS. HULL, *President.*

Attest:
C. H. DAVIS, *Ass't Sec'y.*

48 SAVANNAH TRUST CO.,
[SEAL.] By W. V. DAVIS, *Vice-President.*

Attest:
T. W. ANDERSON, *Secretary.*

ROYAL INDEMNITY COMPANY,
[SEAL.] By EDMUND A. TALLMAN,
Resident Vice-President.
A. D. LIVINGSTON, *Assistant Secretary.*

Approved: March 5, 1913.
FREDERIC DODGE,
U. S. Circuit Judge.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Arthur E. Burr, Frank L. Simpson, and J. Howard Edwards, all citizens of the State of Massachusetts and residents of the District of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the fourth day of April next, pursuant to an appeal duly obtained from a decree of the District Court of the United States for the District of Massachusetts, wherein Joseph Hull, a citizen of the State of Georgia, residing in Savannah, in said State, the Prairie Pebble Phosphate Company, a corporation organized and existing under the laws of the State of Georgia, and the Savannah Trust Company, a corporation also organized and existing under the laws of said State, both said corporations having offices at Savannah aforesaid, are appellants, and you are appellees, to show cause, if any there be, why the said decree, entered against the said appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Frederic Dodge, Circuit Judge, duly assigned to hold the District Court of the United States for the District of Massachusetts, this fifth day of March, in in the year of our Lord one thousand nine hundred and thirteen.

FREDERIC DODGE,
U. S. Circuit Judge.

49 & 50 *Acknowledgment of Service on Citation.*

BOSTON, *March* 6, 1913.

Due and sufficient service of the within citation is hereby accepted in behalf of Arthur E. Burr, Frank L. Simpson and J. Howard Edwards, appellees.

By ARTHUR E. BURR,
Attorney for Respondents.

Clerk's Certificate.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, Charles K. Darling, Clerk of the District Court of the United States, within and for the District of Massachusetts, certify that the foregoing is a true copy of the record and all proceedings in the cause in equity entitled, No. 377, Joseph Hull et al., Complainants, v. Arthur E. Burr et al., Defendants, in said District Court determined, the Opinion of the Court, dated January 25, 1913, the Petition for Appeal, the Assignment of Errors, the Bond on Appeal, and also the original Citation issued upon the appeal of the complainants in said cause, with the Acknowledgment of Service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said district, this twentieth day of March, A. D. 1913.

[SEAL.] CHARLES K. DARLING, *Clerk.*

51 United States Circuit Court of Appeals for the First Circuit, October Term, 1912.

No. 1015.

JOSEPH HULL et al., Complainants, Appellants,
v.
ARTHUR E. BURR et al., Defendants, Appellees.

Appeal from the District Court of the United States for the District of Massachusetts.

Before Putnam, Aldrich and Brown, JJ.

Opinion of the Court.

JUNE 25, 1913.

PUTNAM, *J.:*

The facts in this case are so fully stated in the opinion of the learned judge of the District Court that we do not find it necessary to restate them. We are also entirely satisfied with his conclusions

and with his reasoning so far as the same is necessary to the conclusions reached by him. We find, however, a shorter and more simple way of reaching the result than that suggested by the counsel for the respondents below, the appellees here.

It appears that the parties are the same before the District Court in this case as were joined in the judicial proceedings in Florida described in the opinion referred to. The questions raised, or which may be raised, are substantially the same in each case. While the proceedings in bankruptcy occurred in the same district from which the appeal to us was brought, yet the proceedings in the District Court in no manner invoked the powers of the court in bankruptcy,
but vested entirely on its general powers as a Chancery court,
52 having been instituted by a bill in equity in the proper sense,
of the word. It also appears that the proceedings in Florida were instituted by a bill in equity in the proper sense of the word, although the parties were reversed. The bill before us does not in form ask that we should restrain the proceedings in the Florida court or the plaintiffs in the case there. Its prayer, however, concludes as follows:—

"Inasmuch as your orators are without a practical remedy at law, may it please this honorable court, by its interlocutory decree, to restrain and enjoin the said defendants, and each of them, and each of their attorneys at law and solicitors in Chancery, and each and every one of their agents and attorneys, from asserting or claiming as trustees in bankruptcy, in any court or place, any right, title or interest in or to any of the properties herein described until the further decree of this court; and to make such interlocutory decree final by the final decree of this court."

While this does not in terms name the Florida court, yet a decree in pursuance of the prayer would necessarily restrain the defendants from proceeding in that court with the litigation already pending there. So far as the litigation is concerned, the questions in the Florida court are or may be exactly the same as we have here, and the Florida court being a Chancery court, and a court of superior jurisdiction proceeding in equity, it is for the present purpose of the same dignity and authority as the District Court from which this appeal was taken. Consequently, the District Court, in a case in which it had exercised no special jurisdiction as in bankruptcy, but only its general jurisdiction in equity, is asked to indirectly restrain a State court, also having general jurisdiction in equity, and while proceeding in equity between the same parties in a suit anticipating the suit appealed to us. The result is an attempt on the part of the complainants to obtain an injunction from a United States court to a State court, contrary to the express statute in reference thereto. The authority of the court which first acquired jurisdiction, the parties being substantially the same, must prevail.

Of course, a Federal court proceeding in equity has the same right
to control litigation at common law in State courts, when
53 & 54 equitable rights subsist in preference over rights at common law, which the Federal courts have to restrain common-law suits in other Federal courts. This is the undergoing rule

of Marshall v. Holmes, 141 U. S. 589; but it does not extend further than there applied. The various phases of this topic are so thoroughly covered by decisions of the Supreme Court that it is not necessary to cite in detail those decisions in reference thereto. We only refer again to Marshall v. Holmes, where, beginning at page 596 and ending at page 601, the various phases of the topic are sufficiently explained; and the matter also is somewhat enlarged on in Bank v. Stevens, 169 U. S. 432, 462, and sequence. We leave this appeal to stand on the rules applied in the two cases cited.

The decree of the District Court is affirmed; and the appellees recover their costs of appeal.

Final Decree.

JUNE 25, 1913.

This cause came on to be heard April 22, 1913, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

On consideration whereof, It is now, to wit, June 25, 1913, here ordered, adjudged and decreed as follows: The decree of the District Court is affirmed; and the appellees recover their costs of appeal.

By the Court,

FRANCIS M. FOGARTY, *Clerk.*

55 In the United States Circuit Court of Appeals for the First Circuit.

No. 1015.

JOSEPH HULL et al., Appellants,
v.
ARTHUR E. BURR et al., Respondents.

Petition for a Re-Hearing.

(Filed July 24, 1913.)

Joseph Hull, the Prarie Pebble Phosphate Company and the Savannah Trust Company, the appellants in the above entitled cause, respectfully petition this Honorable Court to grant a re-hearing of the said cause or the reconsideration thereof, upon the following grounds and for the following reasons:

First. That the Court erred in holding that Section 720 of the Revised Statutes prohibited the decree specially prayed for in the bill of complaint for the following reasons:

(*a*) The Court overlooked the fact that the intent of the statute is, primarily, to prohibit a federal court from directly enjoining a state court. Thus, unless the effect of the decree of the Federal Court will be to directly enjoin the prosecution of an action pending in a state court, the statute does not apply.

Hunt vs. New York Cotton Exchange, 205 U. S. at page 338.

56 In the case cited, the injunction in the Federal Court was sustained because the plaintiff therein was not directly a party to the suit in the State Court. In the case at bar, the respondents are not parties to the suit pending in the Florida court, to which reference is made in the bill of complaint; nor are they parties to any suit pending in the Florida court referred to in the argument or cited by respondents. They are not, therefore, parties to any suit either mentioned in the record or dehors the record. If the allegations of the complaint are admitted, the respondents are not trustees of the estate of the Port Tampa Phosphate Company and, under the appointment now claimed, will, therefore, never become parties to any suit now pending in the Florida court.

(*b*) The Federal statute in question applies only to proceedings in a suit pending at the time the action is instituted in the Federal court.

Fisk vs. Union Pacific R. R. Co., 10 Blatchford, 518;
Live Stock Association vs. Louisiana (Opinion by Mr. Justice Bradley of the Supreme Court of the United States) 1 Abb. at pages 404, et seq.;
State Lottery Co. vs. Fitzpatrick, 3 Woods at page 255.

Properly speaking, no suit is now pending in the Florida court involving any of the rights asserted in the bill of complaint in the case at bar, the suit originated by Burr having abated when he ceased to act as trustee. Accordingly, the only suit pending in the courts of that state, to which any of the respondents here are parties, is the action brought by them to revive the suit which Burr originated; and the injunction prayed for in the bill would not restrain the respondents from obtaining a decree of reviver. The only issues in the suit to revive are (1) whether or not the respondents here are trustees in bankruptcy under any valid appointment and (2) if so, does the bankruptcy law permit a suit, which is abated by reason of the resignation of a trustee, to be revived. See sections 11 and 12 of the bill.

57 (*b*) Even though the respondents here should succeed in their suit to revive the action in the Florida court brought by Burr, the prosecution thereof would, in effect be tantamount to the beginning of a new suit in the Florida courts by such respondents, and, as shown above, Section 720 of the Revised Statutes has been held to apply only to the enjoining of actions pending in the state courts at the time of the beginning of the suit in a federal court.

Second. The court erred in overlooking the fact that the bill in the case at bar contains a prayer for general relief, under which the District Court may give the complainant's substantial relief, without granting an injunction, by adjudging:

(*a*) That the respondents do not possess the character of trustees in bankruptcy and that, if they do, they own no interest in the properties mentioned in the bill, and

(*b*) that the respondents are bound and, therefore, estopped from asserting any interest in such properties both by the resolution of the Port Tampa Phosphate Company set out in the bill and by the

judgment rendered by the District Court for the United States for the Southern District of Florida, in the ejectment suit prosecuted in that court against the Port Tampa Phosphate Company by the complainant Hull.

Section 720 of the Revised Statutes of the United States does not apply where the prayer for an injunction is but an incident of the suit and can be stricken out without prejudice to the main object thereof.

Woodfin vs. Phoebus, 30 Fed. at page 293.

Third. The Court erred in overlooking the fact that the decree of the District Court in this cause is, in terms, absolute and in not directing that it be amended by inserting therein a statement that it was made without prejudice to the right of the complainants here to set up in any suitable court or proceeding the contentions advanced in the bill of complaint herein, for the reason that the District Court and this Court have declined to abjudicate upon the merits of
58 the questions and issues presented and tendered by the complainants in their said bill of complaint and, in effect, have ruled and decided that the United States District Court for the District of Massachusetts has no jurisdiction to grant relief to the complainants in said bill; and your petitioners respectfully show that, unless said decree be amended, as herein requested, they fear that it may be pleaded by the respondents as a bar to the determination by a court of complaint jurisdiction of any or all of the questions and issues presented and tendered by the bill of complaint herein.

And your petitioners further show that in Durant vs. Essex Company, 7 Wallace, 107, the Supreme Court of the United States held that, without qualifying words to a decree entered upon the sustaining of a demurrer thereto, the same may be pleaded in bar in any other court where similar issues are presented.

And your petitioners will ever pay.

In the United States Circuit Court of Appeals for the First Circuit

No. 1015.

JOSEPH HULL et al., Appellants,
v.
ARTHUR E. BURR et al., Respondents.

Petition for Rehearing.

I, Eldon Bisbee, of counsel for the complainants-appellants herein, hereby certify that the foregoing petition for rehearing is, in my opinion, well founded in law.

Dated July 18, 1913.

ELDON BISBEE.

59 United States Circuit Court of Appeals for the First Circuit, October Term, 1912.

No. 1015.

JOSEPH HULL et al., Complainants, Appellants,
v.
ARTHUR E. BURR et al., Defendants, Appellees.

Appeal from the District Court of the United States for the District of Massachusetts.

Petition for Rehearing Filed by Joseph Hull et al., on July 24, 1913.

Before Putnam, Aldrich and Brown, JJ.

Opinion of the Court.

SEPTEMBER 12, 1913.

PUTNAM, *J.:*

The parties assume this case to be of so much importance that we think it advisable to file a memorandum with reference to the petition for a rehearing filed on July 24, 1913, being careful not to qualify what we previously said in approval of the opinion and conclusions of the learned judge of the District Court.

The petition proceeds on the theory that our judgment was based on Sect. 720 of the Revised Statutes, prohibiting the Federal courts from enjoining State courts. This is a narrow view, because, while our opinion refers to the statutory prohibition, yet this reference is immediately followed by the statement that "the authority of the court which first acquired jurisdiction, the parties substantially the same, must prevail." That we relied on broad principles, having extensive application, without regard to the fact that one court is a Federal court and the other a State court, is entirely plain
60 from our references to Marshall v. Holmes, 141 U. S. 589, and Bank v. Stevens, 169 U. S. 432, with the remark that "we leave this appeal to stand on the rules applied in the two cases cited." This is particularly noticeable because Bank v. Stevens applied the rule as against a court of the State of New York undertaking to obstruct by injunction the party concerned while proceeding in the Federal courts, in violation of the general rule explained especially at page 461.

One point of criticism by the petitioners for a rehearing is based on the proposition that the proceeding in Florida to which our opinion related was abated until revived by bring- in a new trustee in bankruptcy. This is a trivial proposition when considered in the light of what occurred, and was decided, in the litigation between Hall and Ames in the courts of this circuit, according to the opinions

found in 182 Fed. Rep. 1008, 190 Fed. Rep. 138, and 190 Fed. Rep. 144. A further illustration of the broad rule on which our opinion relied, and of its long reach, is found in the decision of this court in McDermott v. Hayes, by an opinion passed down June 18, 1912, reported in 197 Fed. Rep. 129, beginning especially at the foot of page 135.

It is further said that the original bill contained a prayer for general relief, with reference to which the District Court appealed from might have given the complianants substantial relief without granting any injunction. It is enough to say that no proposition of that character was submitted to the District Court, or brought to our attention when the case was heard before us. On the other hand, the brief of the appellants specifically prayed for a decree quieting title by enjoining the respondents from further asserting any adverse claim to the property, and no other relief was asked for.

As to the request that our decree be amended to operate without prejudice, we need only remark that we see no occasion therefor; but, on the contrary, it is time, so far as we can discover, that all the parties should seek their rights in the court which we are asked to enjoin, which is fully capable of protecting all interests, especially as the ultimate subject-matter of litigation is really, over which that court has direct jurisdiction.

The petition for rehearing filed on July 24, 1913, is denied and the mandate will issue forthwith.

61 & 62 *Order of Court.*

SEPTEMBER 12, 1913.

The court having fully considered the petition for a rehearing filed by the appellants on July 24, 1913, and no judge who concurred in the judgment entered June 25, 1913, desiring that the case be reargued:

The petition for rehearing filed on July 25, 1913, is denied, and the mandate will issue forthwith.

By the Court,

FRANCIS M. FOGARTY, *Clerk.*

63 & 64 *Mandate.*

UNITED STATES OF AMERICA, *ss:*

[L. S.]

The President of the United States of America to the Honorable the Judge of the District Court of the United States for the District of Massachusetts, Greeting:

Whereas, lately in the District Court of the United States for the District of Massachusetts, before you, in a cause numbered and entitled, No. 377, Equity Docket, Joseph Hull et al., Complainants, v. Arthur E. Burr et al., Defendants, the following Final Decree was entered February 24, 1913:—

Final Decree.

FEBRUARY 24, 1913.

DODGE, *J.*:

This cause came on to be heard at this term upon the demurrer to the plaintiffs' bill as amended February 24, 1913, and was argued by counsel; and thereupon, upon consideration thereof, It is ordered, adjudged and decreed, that the demurrer be and it hereby is sustained, and that the bill be and it hereby is dismissed, with costs to be taxed by the clerk.

By the *Clerk*.

CHARLES K. DARLING, *Clerk*.

And whereas said Joseph Hull et al. appealed from said final decree to the United States Circuit Court of Appeals for the First Circuit, as by the inspection of the transcript of the record in said cause of the said District Court, which was brought into the United States Circuit Court of Appeals for the First Circuit, by virtue of the aforesaid appeal, wherein Arthur E. Burr, Frank L. Simpson and J. Howard Edwards are appellees, agreeably to the act of Congress, in such cases made and provided, fully and at large appears,

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and twelve, the said cause came on to be heard before the said Circuit Court of Appeals, on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now, to wit, June 25, 1913, here ordered, adjudged and decreed as follows: The decree of the District Court is affirmed; and the appellees recover their costs of appeal.

Costs in this United States Circuit Court of Appeals for which execution is to issue from said District Court in favor of said Arthur E. Burr et al., Defendants, Appellees, and against said
65 & 66 Joseph Hull et al., Complainants, Appeallants, are taxed at twenty-five dallars ($25).

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the aforesaid decree of this court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the thirteenth day of September, in the year of our Lord one thousand nine hundred and thirteen.

FRANCIS M. FOGARTY,
Clerk of the United States Circuit Court of Appeals for the First Circuit.

Costs of appellees:

Attorney	$20.00
Mandate	5.00
	$25.00

(Endorsed:) No. 1015. United States Circuit Court of Appeals for the First Circuit. October Term, 1912. Joseph Hull et al., Complainants, Appellants, v. Arthur E. Burr et al., Defendants, Appellees. Mandate. September 13, 1913. Oct. 7, 1913. Recalled and cancelled. Francis M. Fogarty, Clerk.
(Stamped:) U. S. District Court, Mass. Dist. Sep. 13, 1913. Filed in Clerk's office. 481 Eq.

67 & 68 United States Circuit Court of Appeals for the First Circuit.

No. 1015.

JOSEPH HULL et al., Complainants, Appellants,
v.
ARTHUR E. BURR et al., Defendants, Appellees.

Appellants' Petition for Recall of Mandate.

(Filed October 6, 1913.)

Joseph Hull et al., above named appellants respectfully show that the decree was entered in the District Court of the United States for the District of Massachusetts, February 24, 1913, in the above entitled cause and that this Honorable Court affirmed said decree on the twenty-fifth day of June, 1913, and that your petitioners herein seasonably petitioned for a rehearing in said cause on the twenty-fourth day of July, 1913, which was denied September 12, 1913, and that, in the opinion denying said petition was included an order that the mandate issue forthwith; that said mandate issued accordingly and was received and filed in said District Court on September 13, 1913.

Your petitioners further show that they were not aware that their petition for a rehearing had been denied nor that the mandate had been ordered to issue forthwith until after it had been filed in said District Court.

Your petitioners further show that they desire to file a petition for an appeal to the Supreme Court of the United States from the judgment and decree of this Honorable Court,

Wherefore your petitioners pray that said mandate issued by this Honorable Court be recalled until after said petition for appeal to the United States Supreme Court shall be considered and passed upon by this Honorable Court.

By their Attorneys,

GASTON, SNOW & SALTONSTALL.

69 & 70 *Appellants' Petition for Appeal to the Supreme Court of the United States.*

(Filed October 6, 1913.)

Joseph Hull et al., above named appellants, respectfully show that they are aggrieved by the opinion, judgment and decree entered in the above entitled cause in the United States Circuit Court of Appeals for the First Circuit on the twenty-fifth day of June, 1913, affirming the decree of the District Court of the United States for the District of Massachusetts, and by the opinion, judgment and decree entered in said United States Circuit Court of Appeals for the First Circuit September 12, 1913, denying said appellants' petition for rehearing duly filed herein; and that the matter in controversy in said suit exceeds one thousand dollars besides costs; that said order and decree are final, and it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore the said appellants pray that an appeal be allowed them in the above entitled cause directing the Clerk of the United States Circuit Court of Appeals for the First Circuit to send the records and proceedings in said cause with all things concerning the same to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said appellants, may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

GASTONSTALL, SNOW & SALTONSTALL,
Solicitors for Appellants.

October 7, 1913. The foregoing petition for appeal is allowed.

W. L. PUTNAM,
Senior Circuit Judge.

71 & 72 *Assignment of Errors.*

(Filed October 6, 1913.)

Come now Joseph Hull, The Prairie Pebble Phosphate Company and the Savannah Trust Company, the above-named complainants and appellants, and in support of their appeal severally file the following assignments of error:

First. The Circuit Court of Appeals erred by its decree affirming the decree of the District Court, and without waiving other errors, specify the following:

Second. The said Court of Appeals erred in its ruling that a statute of the United States (presumably Section 720 thereof) prohibited a decree for the complainants specially prayed for in the bill of complaint, the special prayer being set forth in the opinion of the said Court of Appeals.

Third. Said Court of Appeals erred in ignoring the prayer in the bill for general relief, under which a final and effective decree for

complainants can be rendered, without directly or indirectly enjoining the defendants from prosecuting in the State Court of Florida any suit pending therein when the present suit was brought.

Fourth. Said Court of Appeals in its opinion states as follows, to wit: "So far as the litigation is concerned, the questions in the Florida Court are or may be exactly the same as we have here." It was error to base its decree upon that statement, on the ground that to preclude the Federal Court from exercising its jurisdiction on the merits of the issues and questions tendered by the present bill of complaint in the Federal Court, the State Court must have jurisdiction of such issues and questions at the time the bill in the Federal Court was filed, whereas the 11th and 12th sections of the said bill conclusively show that at the time aforesaid the Florida State Court did not have jurisdiction of such issues and questions, and that the defendants were not at the time aforesaid parties to any suit pending in the Florida Court which involved such issues and questions on the merits raised by the said bill of complaint.

Fifth. Said Court of Appeals erred in ruling in effect that the District Court had not jurisdiction to render a decree depriving the defendants as alleged trustees in bankruptcy of any benefit of the alleged decree adjudging the Port Tampa Phosphate Company a bankrupt, on the ground that the said alleged decree, under which defendants exclusively claim, was obtained by fraud and perjury perpetrated upon the said District Court as a court of bankruptcy.

73 & 74 Sixth. Said Court of Appeals in its opinion states as follows, to wit: "The facts in this case are so fully stated in the opinion of the learned District Court that we do not find it necessary to restate them"; and based its judgment upon the facts as stated by the District Court. This was error in this: the material facts of the resolution of the Port Tampa Phosphate Company, set forth in the 9th section of the bill of complaint, whereby said Company sold to complainant Joseph Hull all the interests it ever had in the properties, more than six months before the petition in bankruptcy was filed; and the judgment recovered by said Hull in the ejectment suit against the said Company in the Florida Federal Court, and set forth in the 16th section of the bill of complaint, are not mentioned or referred to in the opinion of the District Court, and the said resolution, and the said judgment conclusively estop and preclude the Company and defendants as trustees claiming under said Company from asserting any interest in the properties involved in this suit, which said Court of Appeals did not consider or allude to in its opinion.

Seventh. Said Court of Appeals in its opinion declared and ruled as follows, to wit: "We are also entirely satisfied with his conclusions and his reasoning (of the District Court) so far as the same was necessary to the conclusions reached by him." This ruling of the Court of Appeals was erroneous in this: that it affirms the conclusions and errors of the District Court upon the following points, to wit:

(A) The District Court held that the bill of complaint showed

that it was a court of bankruptcy, had jurisdiction of the subject matter and person of the Port Tampa Phosphate Company to adjudge said Company a bankrupt.

(B) That fraud and perjury of the officers of said Company, three of whom were the petitioning creditors, all of whom were admitted by the demurrer, were not available to vitiate and avoid the alleged decree in bankruptcy, and defendants' character as such alleged trustees.

(C) That it was immaterial to the plaintiffs whether they were sued in the Florida Court by the defendants as trustees, or by the said alleged bankrupt, whereas, the said resolution of the bankrupt and the said judgment estopped and precluded it from suing the plaintiffs; and the bill avers that its said officers who were the petitioning creditors, and others of its officers, fabricated the proceedings in bankruptcy and every jurisdictional fact, in said
75 & 76 proceedings for the sinister purpose and interest of corruptly obtaining said alleged decree in bankruptcy, and an apparent, but not real, trustee, who could sue, vex and annoy the present plaintiffs.

(D) The District Court ruled that if the facts stated in the plaintiffs' bill of complaint are true (they are admitted by the demurrer), they constitute a complete defense to the suit by the present defendants as plaintiffs in the Florida Court, and that such defense in the State Court, defeated jurisdiction of the Federal Court to grant any relief, whereas, it is apparent from the averments in sections 11th and 12th of the present bill of complaint that there is no suit pending in the Florida Court, in which said facts can be set up as a defense, and the Florida Supreme Court, has expressly so decreed.

Eighth. It was error in the said Court of Appeals no- to order the decree of the District Court reversed and modified so as to read "without prejudice," so that said decree could not be pleaded as res adjudicata in any other suit.

Ninth. It was error not to hold the present bill of complaint and direct further proceedings thereon until at least a decree of revivor is obtained upon the supplemental bill in the State Court, set forth in the 12th section of the present bill; and upon the facts stated in the present bill, it is submitted such decree of revivor cannot legally be obtained.

Tenth. For other errors apparent upon the record, to be pointed out in the brief.

Wherefore, appellants severally pray, the premises being considered, that the said decree appealed from may be reversed by this Honorable Court, and speedy justice done, and appellants will ever, so severally pray, &c.

GASTON, SNOW & SALTONSTALL,
Counsel for Appellants.

Order of Court.

OCTOBER 7, 1913.

It is ordered that the mandate herein issued September 13, 1913, be and the same hereby is recalled and cancelled.

By the Court,

FRANCIS M. FOGARTY, *Clerk.*

77 & 78 *Order of Court.*

OCTOBER 7, 1913.

Upon the filing of the appellants' petition for appeal to the Supreme Court of the United States, It is ordered that citation, signed by the Senior Circuit Judge, issue when a bond approved by the Clerk has been filed.

By the Court,

FRANCIS M. FOGARTY, *Clerk.*

79 & 80 *Bond on Appeal.*

(Filed and Approved October 7, 1913.)

Know all men by these presents, That we, Joseph Hull, The Prairie Pebble Phosphate Company and Savannah Trust Company and Massachusetts Bonding and Insurance Company, a corporation of the Commonwealth of Massachusetts, are held and firmly bound unto Arthur E. Burr, Frank L. Simpson and J. Howard Edwards claiming to be trustees of the estate of the Port Tampa Phosphate Company in bankruptcy in the sum of two hundred and fifty dollars for the payment whereof well and truly to be made we bind ourselves, our heirs, executors and administrators and successors and assigns jointly and severally firmly by these presents.

The condition of the foregoing obligation is such that, whereas the said Joseph Hull, The Prairie Pebble Phosphate Company and the Savannah Trust Company are about to enter and institute an appeal to and in the Supreme Court of the United States from a final decree of the United States Circuit Court of Appeals for the First Circuit, entered on the 25th day of June, A. D., 1913, in a certain cause therein pending wherein the above-named Joseph Hull, The Prairie Pebble Phosphate Company and the Savannah Trust Company are plaintiffs and appellants, and the said Arthur E. Burr, Frank L. Simpson and J. Howard Edwards as trustees of the estate of the Port Tampa Phosphate Company in bankruptcy are defendants and appellees, now, therefore, if the said Joseph Hull, The Prairie Pebbel Phosphate Company and the Savannah Trust Company shall prosecute their said appeal to effect, and if they fail to make their plea good, shall answer all costs and damages, then this obligation shall be null and void, else shall be and remain in full force and effect.

Witness our hands and seals this 4th day of October, A. D. 1913.

JOS. HULL. [SEAL.]

[SEAL.] PRAIRIE PEBBLE PHOSPHATE CO.,
By JOS. HULL, *President.*

Attest:
C. H. DAVIS,
Ass't Sec'y.

[SEAL.] SAVANNAH TRUST COMPANY,
By W. V. DAVIS, *Vice-President.*

Attest:
T. W. ANDERSON,
Secretary.

[SEAL.] MASSACHUSETTS BONDING AND INSURANCE COMPANY,
By SAMUEL S. PERRY, *Vice-President.*

Attest:
GEO. W. BERRY,
Assistant Secretary.

Approved:
FRANCIS M. FOGARTY, *Clerk.*

81 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Arthur E. Burr, Frank L. Simpson and J. Howard Edwards, all citizens of the State of Massachusetts and residents of the District of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, on the * first day of November next, pursuant to an Appeal duly obtained from a decree of the † United States Circuit Court of Appeals for the First Circuit wherein Joseph Hull, a citizen of the State of Georgia, residing in Savannah, in said State, the Prairie Pebble Phosphate Company, a corporation organized and existing under the laws of the State of Georgia, and the Savannah Trust Company, a corporation also organized and existing under the laws of said State, both said corporations having offices at Savannah aforesaid, are appellants and you are appellees, so show cause, if any there be, why the said decree, entered against the said appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William L. Putnam, Senior Circuit Judge and a Judge of the United States Circuit Court of Appeals for the First Circuit, this seventh day of October, in the year of our Lord one thousand nine hundred and thirteen.

W. L. PUTNAM,
Senior Circuit Judge.

*Not exceeding 30 days from the day of signing.
†Name of Court in which the Decree is entered.

82 Oct. 9, 1913.

Service of the within citation is hereby accepted on behalf of all the appellees.

By Their Attorney, ARTHUR E. BURR.

83 *Clerk's Certificate.*

I, Francis M. Fogarty, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the foregoing is a true copy of the record and all proceedings of said Circuit Court of Appeals in the cause entitled, No. 1015, Joseph Hull et al., Complainants, Appellants, v. Arthur E. Burr et al., Defendants, Appellees, in said Circuit Court of Appeals determined, the Petition for Appeal, the Assignment of Errors, Bond on Appeal and also the original Citation issued upon the appeal of Joseph Hull et al., Complainants, Appellants, in said cause with acknowledgment of service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit the fifteenth day of October, A. D. 1913.

[Seal United States Circuit Court of Appeals, First Circuit.]

FRANCIS M. FOGARTY, *Clerk.*

Endorsed on cover: File No. 23,918. U. S. Circuit Court Appeals, 1st Circuit. Term No. 767. Joseph Hull, The Prairie Pebble Phosphate Company and The Savannah Trust Company, appellants, vs. Arthur E. Burr, Frank L. Simpson and J. Howard Edwards. Filed October 27th, 1913. File No. 23,918.

SUBJECT INDEX.

Argument on Motion to Dismiss.

Argument on Motion to Affirm.

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Section 46 of the bankruptcy act should receive a liberal construction, and general legislation of similar character has been held to dispense with the necessity of formally substituting a successor.

The name of the party to the record was never conclusive.

Even without a statute, this court has held that a succeeding trustee may be substituted in this court, although his succession occurred before the entry of appeal.

The Supreme Court of Florida decided on the fourth appeal that the suit did not abate on the change of trustees.

There need not be any hearing on a supplemental bill filed before decree.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1913.

No. 767.

JOSEPH HULL ET AL., APPELLANTS,

vs.

ARTHUR E. BURR ET AL., APPELLEES.

MOTION TO DISMISS.

Now come the appellees in the above-stated cause and hereby move the court to dismiss the appeal herein, on the ground that the decision and judgment of the Circuit Court of Appeals for the First Circuit was final, and no appeal lies therefrom to this court, because jurisdiction of the matter of the bill of complaint in the district court was based and depended solely upon diverse citizenship of the parties, as appears from the allegations of the said bill of complaint.

And in case the foregoing motion shall be denied the

appellees move the court for an affirmance of the decree appealed from, upon the ground that the questions on which the decision of the cause depends are so frivolous as not to need further argument.

FRANK L SIMPSON,
E. R. GUNBY,
JAMES F. GLEN,
Counsel for Appellees.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1913.

No. 767.

JOSEPH HULL *et al., Appellants,*

vs.

ARTHUR E. BURR *et al., Appellees.*

BRIEF IN SUPPORT OF MOTION TO DISMISS.

The appellants were complainants in the district court and appellants in the Circuit Court of Appeals. Their bill was dismissed on demurrer in the district court and the decree of dismissal affirmed. The bill alleged diverse citizenship as the ground of jurisdiction, and made no claim that the district court had jurisdiction on any other ground. Briefly analyzed the plaintiffs' claims, treating them for convenience as identical in title, as set forth in their bill, are as follows:

(*a*) They own certain properties in Florida, real and personal, and are in possession thereof, in which the Port Tampa Phosphate Company, a Massachusetts corporation, formerly

claimed some equitable interest, which it sold to them (pars. 2-9).

(*b*) The District Court of Massachusetts on November 27, 1905, undertook on the petition of three creditors, who were directors, to adjudge the Massachusetts corporation a bankrupt, but the proceedings were defective, irregular, void, and fraudulent (pars. 11-26).

(*c*) The trustees in bankruptcy of the Port Tampa Phosphate Company appointed under these proceedings are undertaking by proceedings in equity in Florida to assert an equitable ownership in the property as successors to the company (par. 12).

(*d*) The Florida courts in such proceeding have declined to permit an attack on the bankruptcy adjudication and proceedings (par. 27).

(*e*) If the Port Tampa Phosphate Company had any equitable title to the property it still remains in that company, and a decree in the Florida suit would not protect plaintiffs (par. 28).

The prayer of the bill is for an injunction restraining the trustees "from asserting or claiming as trustees in bankruptcy in any court or place any right, title, or interest in or to any of the properties."

Reduced to its elements, the complainants' claim is that as owners of certain property under the laws of Florida they have the right, conferred by general law, not to be harassed in respect thereto by the assertion of an unfounded claim, and the defendants, under the unfounded claim that they are trustees in bankruptcy of the Port Tampa Company, are harassing them with litigation in Florida by asserting their succession to an interest in the property claimed to have been owned by the bankrupt. Obviously the question of ownership of the property as between the complainants and the bankrupt involves no Federal question. Equally true is it that the right of an owner to enjoy his property free from the assertion of unfounded claims involves no Federal

question. In no way, therefore, has Federal law anything to do with the controversy, except in so far as it affirms or denies the *status* or capacity of the defendants to represent the bankrupt. It has nothing to do with the merits of the controversy, which depend solely on the laws of Florida. The sole question, therefore, is whether or not the complainants by asserting that the *defendants* do not have the *status* or capacity they claim in the Florida suit can make a case arising under the laws of the United States. The complainants claim no right under the laws of the United States, but merely assert that the defendants do not possess the capacity they claim under these laws, and such a case, it has often been decided, is not one arising under the laws of the United States for the purpose of founding jurisdiction in the Federal court.

Devine *vs.* Los Angeles, 202 U. S., 313.
Boston, etc., Min. Co. *vs.* Montana, etc., Co., 188 U. S., 632.
F. C. & P. R. Co. *vs.* Bell, 176 U. S., 321.
Shulthis *vs.* McDougal, 225 U. S., 561.
See also Bagley *vs.* Fire Co., 212 U. S., 477.
Empire Co. *vs.* Hanley, 198 U. S., 292.

Motion to Affirm.

I.

No argument is necessary to demonstrate that the appeal is frivolous, as the bill, apart from other considerations, is expressly forbidden by at least two Federal statutes.

As already shown, the object of the bill is to impeach the capacity or *status* of the trustees to maintain the pending litigation in Florida, and this although it is provided by section 21*c* of the bankruptcy act that—

> "A certified copy of the order approving the bond of a trustee shall constitute *conclusive* evidence of the vesting in him of the title to the property of the bankrupt."

Section 24*b* of the bankruptcy act likewise gives *"jurisdiction in equity,* either interlocutory or final, to superintend and revise in matter of law" to the Circuit Court of Appeals, to be "exercised on due notice and petition by any party aggrieved."

Apart, therefore, from general considerations relating to proceedings in the nature of proceedings *in rem,* to which all the world is deemed party, and which so far as they by adjudication establish a *status* are binding on the world (Broderick's Will, 21 Wall., 503; Graham *vs.* Boston, etc., R. Co., 118 U. S., 161; Michaels *vs.* Post, 21 Wall., 398; Lamp Chimney Co. *vs.* Brass Co., 91 U. S., 656; Manson *vs.* Williams, 213 U. S., 453; Hebert *vs.* Crawford, 228 U. S., 204), and apart from the absence of bankruptcy jurisdiction, either original or reviewing, in a court of equity (*Ex parte* City Bank, 3 How., 292; U. S. F. & G. Co. *vs.* Bray, 225 U. S., 205; Robertson *vs.* Howard, 229 U. S., 254), and apart from the fact that the bankruptcy act itself confers such "jurisdiction in equity" elsewhere (sec. 24*b*), the provision of section 21*e* was deliberately adopted to forbid attacks on the title of the trustee, leading to great delays and embarrassment in the winding up of estates, as is made abundantly plain by examining the history of such provisions, and the words "conclusive evidence" are words of well-understood technical significance in reference to adjudications.

Gelston *vs.* Hoyt, 3 Wheat., text 320-322.
Meadows *vs.* Kingston, Ambler, 756.
II Wigmore on Evidence, sec. 1347.
13 Halsbury's Laws of England, secs. 744, 748, 757.
Custard *vs.* Wigderson, 110 N. W., 263.

Section 21*e* is a conspicuous example of statutory evolution. In England, where the adjudication was the act of commissioners and not of the court, as it was also under the Federal bankruptcy act of 1800, it was found that great difficulties were encountered in proving the title of the as-

signees in suits instituted by them, as it involved proof of the regularity of the proceedings.

1 Daniell's Ch. Pl. & Practice, 65, 66.

In order to furnish a partial remedy, 49 Geo., 111, c. 121, known as Sir Samuel Romilly's Act, provided in substance that in any action by or against the assignee, the commission and proceedings of the Commissioners should be evidence of the petitioning creditor's debt, of the trading, and bankruptcy, unless the adverse party should give notice that these were to be disputed. This act was construed merely to make the commission and proceedings evidence, but not conclusive evidence, even when the adverse party did not give notice.

1 Bacon's Abridgment, 755.

Skaife *vs.* Howard, 2 B. & C., 560.

The act of 6 Geo. IV, c. 16, thereupon provided that no proof should be required of the trading, or act or acts of bankruptcy, unless the adverse party gave notice that they were disputed. It further provided that if the bankrupt did not within two months (if within the kingdom), or within twelve months (if without the kingdom), give notice of his intention to dispute the commission, and proceed therein with due diligence, the depositions taken before the Commissioners should be *"conclusive evidence"* of the matters therein contained in all actions by the assignees for any debt or demand for which the bankrupt could have sued. Under this act it was held that where no notice had been given the commission could not be disputed, even if, upon the face of the proceedings, it apeared that the act of bankruptcy was insufficient.

Bevan *vs.* Lewis, 1 Simons, 378.

Macbeath *vs.* Coates, 4 Bingham, 34.

Earith *vs.* Schroder, 1 Moody & Malkin, 24.

See also Kitchener *vs.* Power, 3 Ad. & El., 232.

By 1 & 2 William IV, c. 56, the bankrupt was authorized to prosecute a petition of review, and it was provided that if the adjudication should not be set aside it should be *"conclusive evidence"* as against the bankrupt, the petitioning creditor, any assignee or party claiming under the assignee, and all persons indebted to the bankrupt's estate.

II Starkie on Evidence, 126.

The Bankruptcy Consolidation Act of 1849, 12 & 13 Vict., c. 106, substantially re-enacted the provisions then existing, but it contained some additional provisions to those in the acts already referred to. Among these was a provision that the notice in the *"Gazette"* should be *"conclusive evidence"* in all suits brought by the assignees for any debt or demand for which the bankrupt might have sued had he not been adjudged a bankrupt—

> "that such person so adjudged a bankrupt became a bankrupt before the date and suing forth of such fiat, or before the date and filing of the petition for adjudication, and that such fiat was sued forth, or such petition filed, on the day on which the same is stated in the *Gazette* to bear date."

This act contained another provision, applicable to cases in which the bankrupt could not have sued, such as cases to set aside a preference, dispensing with the necessity of proof of the petitioner's debt or the act of bankruptcy, unless the adverse party gave notice that these were disputed.

Pennell *vs.* Howe, 3 Drewry, 337.

Finally, under the act of 1883, now in force in England, a copy of the *"Gazette"* containing the notice is "conclusive evidence" as against the world, with the right given to strangers to appeal if they are parties aggrieved, corresponding to the provision of section 24*b* of the Federal bankruptcy act.

46 & 47 Vict., c. 52, sec. 132.

Ex parte Learoyd, *Re* Foulds (1878), 10 Ch. D., 3.

The Federal bankruptcy act of 1841 provided, by section 1, that all decrees of adjudication, not re-examined in the bankruptcy court "shall be deemed final and conclusive as to the subject-matter thereof," and by section 15 it provided that a copy of the decree of bankruptcy and appointment of assignees should be recited in every deed of lands, and such recital and a certified copy of the decree should be "full and complete evidence both of the bankruptcy and assignment."

See Shawhan *vs.* Wherritt, 7 How., 627.

In the bankruptcy act of 1867 a certified copy of the assignment to the assignee was made "conclusive evidence of his authority to sue" in all suits prosecuted by the assignee.

The history of this legislation, both in England and this country, shows beyond question the purpose of using the words "conclusive evidence"—that they were deliberately used in their strict technical sense as applicable to judgments, and for the express purpose of forbidding such collateral attacks as the one now sought to be made.

For these reasons the district court, as a court of equity, was entirely without jurisdiction of the subject-matter of the bill, and the only court under the bankruptcy act that did have any "jurisdiction in equity" in such cases was the Circuit Court of Appeals, which could have exercised it by way of review in regard to "matter of law" on timely application.

Bankruptcy act, sec. 24*b*.

II.

The maintenance of the bill is directly forbidden by another Federal statute, which has been in force ever since 1793. Its sole object is to seek from a Federal court of equity an injunction against *prior* proceedings *pending* in a State court of equity, both of which are governed by and bound to administer the same rules of law, *and without any*

intervening equity to support the bill. Comity would forbid such a suit apart from statute.

Orton *vs.* Smith, 18 How., 263.
Mead *vs.* Merritt, 2 Paige, 402.
Carson *vs.* Dunham, 149 Mass., 52.
Royal League *vs.* Kavanagh, 233 Ill., 175.
Cole *vs.* Cunningham, 133 U. S., 107.

But section 720 of the Revised Statutes, now section 265 of the Judicial Code, is a conclusive answer to the bill, as was held by the Circuit Court of Appeals.

Diggs *vs.* Wolcott, 4 Cranch, 179.
Peck *vs.* Jenness, 7 How., 612.
United States *vs.* Keokuk, 6 Wall., text 517.
United States *vs.* Johnson Co., 6 Wall., text 195.
Watson *vs.* Jones, 13 Wall., 678.
Haines *vs.* Carpenter, 91 U. S., 254.
Dial *vs.* Reynolds, 96 U. S., 340.
Sargent *vs.* Helton, 115 U. S., 348.
Moran *vs.* Sturges, 154 U. S., 256.
Ex parte Chetwood, 165 U. S., 443.
Central Nat. B'k *vs.* Stevens, 169 U. S., 432.
United States *vs.* Parkhurst-Davis, &c., Co., 176 U. S., 317.
Julian *vs.* Central Trust Co., 193 U. S., 93.
Wagner *vs.* Drake, 31 Fed. Rep., 849.
Maloney *vs.* Mass. Ben. Ass'n, 53 Fed. Rep., 209.
Whitney *vs.* Wilder, 54 Fed. Rep., 554.
Sharon *vs.* Terry, 36 Fed. Rep., text 365, 366.
Evans *vs.* Gorman, 115 Fed. Rep., 399.

Of course, there are cases not within the statute where the Federal equity court can, as any equity court could, by injunction directed to the parties, arrest proceedings in another jurisdiction, but in all such cases there is some independent ground of equity jurisdiction. Such, for ex-

ample, are proceedings in aid of the paramount or previously acquired jurisdiction of the court itself, either as a court of law or equity, for this exception rests upon the same principle as the rule. But the foundation of equity jurisdiction in all cases to restrain *prior* proceedings in another court must be that it would be inequitable to permit them to proceed, not by prejudging in another court the merit of the claim, but because they are prosecuted fraudulently, or by collusion, or to secure some unconscionable advantage, or in violation of some law of the domicile or the like. And that is but another way of saying that a party cannot come into a court of equity without a right to equitable relief. There must be some equitable ground to interfere with the prosecution of the pending suit, and such ground does not exist merely because the court in which the suit is pending can or will reach a certain conclusion. There is no charge in the present bill that the trustees in bankruptcy are prosecuting the Florida suit fraudulently or in bad faith, and obviously there could be none, as they are merely discharging the duty devolved upon them under the bankruptcy act. The property is in Florida, and the rights in it must be settled according to the laws of Florida, and obviously Florida, where the litigation has already been pending for years, is the proper forum for their determination.

See Bank *vs.* Stevens, 169 U. S., text 464.

III.

The Proceedings of the Florida Courts Must Be Given Full Faith and Credit.

Anomalous proceedings usually destroy themselves, and this one is no exception. Under section 1 of article 5 of the Federal Constitution, "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general

laws prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof."

The act of Congress, after prescribing the mode of authentication, provides as follows:

> "And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."
>
> Rev. Sts., sec. 905.

Both the courts below and this court take judicial notice of the laws of Florida.

Hawley *vs.* Donoghue, 116 U. S., 1.

Fourth Nat. B'k *vs.* Francklyn, 120 U. S., 747.

Judicial notice is thus taken of the following statutory provision, under which five appeals have already been prosecuted to and decided by the Supreme Court of Florida in this case, viz:

> "Appeals may be taken and prosecuted from any interlocutory order, decision, judgment or decree of the circuit courts of this State, when sitting as courts of equity."
>
> General Statutes of Florida, sec. 1908.

Such faith and credit must be given to these judicial proceedings as they have by law or usage in Florida, and that is *conclusive* effect, for the questions thus decided passed beyond subsequent review in the courts of Florida. As to them there has been a final judgment or decree.

McKinnon *vs.* Johnson, 57 Fla., 120.

Wilson *vs.* Fridenburg, 21 Fla., 386.

Both the constitutional provision and the Federal statute relate to "judicial proceedings," and it is not necessary to their application that there should be a final judgment in

the cause. It is enough that the proceedings are "judicial proceedings" and that some point has been investigated or adjudicated.

In re Rooney, Fed. Cases, No. 12,032.

It was thus impossible for the Federal district court of Massachusetts to do otherwise than accept, as entitled to faith and credit, what had already been adjudicated in the judicial proceedings in Florida, as it possessed no power to review or overturn what had passed beyond review in Florida; hence, both in respect to the alleged effect of the judgment in ejectment and the ability to attack collaterally the bankruptcy proceedings, or the appointment of the defendants as trustees, the complainants were effectually concluded, which concluded their whole case.

IV.

Laches.

The complainants' bill is barred by laches, apparent on the face of the bill.

When the bill now before this court was filed in the district co rt the litigation between the parties was not in its infancy, but had been already before appellate courts in the phases shown by the decisions cited below, and it has since been before the Supreme Court of Florida in two phases.

Hull *vs.* Burr, 153 Fed., 945.
Hull *vs.* Burr, 58 Fla., 432.
Hull *vs.* Burr, 61 Fla., 625.
Hull *vs.* Burr, 62 Fla., 499.
Hull *vs.* Burr, 64 Fla., 83.
Burr *vs.* Hull, 63 So., 300.
State *vs.* Whitney, Judge, 63 So., 299.

The adjudication had been made nearly seven years before the filing of the present bill, and all of the facts now alleged were discoverable from an examination of the records of the district court. As said by this court in a case already cited:

> "Parties cannot thus, by their seclusion from means of information, claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their *status* and condition, and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings *in rem*."
>
> Broderick's Will, 21 Wall., 503.

Obviously the first inquiry in defense of any suit is as to the title or capacity of the complainant to sue, and when that title is based upon the adjudication of a court to which immediate reference is given, the defendant, if he wishes to question it, must be diligent, because he is charged with knowledge of what he could have ascertained by examination of the court records to which he is referred. A denial of the capacity to sue is in the nature of a plea in abatement, which cannot be presented after years of litigation on the merits, and *a fortiori* will a party not be permitted to impeach the judicial proceedings from which the capacity was acquired when to do so would work a wrong on intervening rights. A party cannot ask a court of equity to assist him when to do so would work a fraud on the rights of innocent parties and his own laches is responsible for the condition.

Hardt *vs.* Heidweyer, 152 U. S., 547.

Expedition in the settlement of the estates of bankrupts is one of the main objects of the bankruptcy act (Bailey *vs.* Glover, 21 Wall., 342), and the act certainly never contemplated that an adjudication could be decreed a nullity in a collateral proceeding seven years after it was made. The

act is full of provisions to the contrary end, and even a less number of weeks has been held fatal to a direct application in the bankruptcy court itself to set aside an adjudication.

In re First Nat. Bank, 152 Fed. Rep., 64.

See also

In re Marion Contract, &c., Co., 166 Fed. Rep., 618.
In re New England Breeders' Club, 169 Fed. Rep., 586.
In re Ives, Fed. Cases, No. 7115.
Ex parte City Bank, 3 How., 292.

A court of equity will refuse relief on the ground of laches where to grant the relief prayed would work injustice and there has been unreasonable delay in seeking it.

Penn Mutual, &c., Co. *vs.* Austin, 168 U. S., 685.
Abraham *vs.* Ordway, 158 U. S., 416.
Galliher *vs.* Cadwell, 145 U. S., 368.
O'Brien *vs.* Wheelock, 184 U. S., 450.
Hendrix *vs.* Perkins, 114 Fed. Rep., 801.
Denton *vs.* Baker, 93 Fed. Rep., 46.
Brown *vs.* County, 95 U. S., 157.

Many other cases from this court might be cited to the same effect, and the principle cannot be denied. Nor can it be denied that means of knowledge—in this case access to the court records—are the equivalent of actual knowledge.

Wood *vs.* Carpenter, 101 U. S., 135.
Ware *vs.* Galveston City Co., 146 U. S., 102.
Swift *vs.* Smith, 79 Fed. Rep., 709.

It is familiar law that a plea in abatement will not be permitted after pleading to the merits, and the whole object of this bill is to get the benefit of matter in abatement, which should have been pleaded in the beginning (Beames' Pleas in Equity, 56; Mitford's Eq. Pl., 230), although the litiga-

tion has been contested on the merits for years and any matter in abatement thereby waived. Apart from the question of laches, the plaintiffs, by thus pleading in bar, estopped themselves as to matters in abatement, and it is preposterous to suppose that they can now be permitted to litigate matter in abatement of the Florida suit by original bill to enjoin its prosecution filed in the District Court of Massachusetts, especially when a proceeding by the bankrupt company would be barred by limitation and when the rights of its creditors would likewise be barred. The bill, in reality, seeks to accomplish a fraud on the bankrupt company and its creditors, and, if sustained, would accomplish one, notwithstanding the fact that plaintiffs accepted the adjudication as valid, as did also the company and its creditors, until by the lapse of time the latter are left without other remedy. Good conscience, equity, and justice forbid the maintenance of the bill, and require that the plaintiffs be bound by the situation they have voluntarily accepted when its change would work a fraud on innocent third parties. There can be no doubt that the plaintiffs cannot thus be permitted to secure an unconscientious advantage in a court of conscience.

V.

The Florida Suit Did Not Abate on the Change of Trustees.

By the fourth assignment of error, by section D of the seventh, and by the ninth, it is sought to contend that the Florida suit had abated by the substitution of Burr, Simpson, and Edwards as trustees for Burr alone, and thus to withdraw the case from the application of general rules as to non-interference with a pending proceeding in another court. As pointed out by the Circuit Court of Appeals in the petition for rehearing, this is a "trivial proposition," and it is founded on an erroneous predicate.

"The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor."

Bankruptcy act, sec. 46.

The object and purpose of section 46 are made abundantly manifest by consideration of the situation it was designed to meet. In this connection it may not be inappropriate to point out that even independently of section 46 a suit in equity of the present character, brought by a trustee in his official capacity, did not abate on the substitution of trustees, and there was no occasion for a bill of revivor.

A bill of revivor is a remedy to make perfect a suit that has abated, but the present suit did not abate by the substitution of trustees, and that is true under the English chancery practice, whether section 46 of the bankruptcy act applies or not. In case of a sole complainant suing in his own right, or in case of a female complainant, death in the former case and marriage in the latter caused a suit to abate; so also did the death of a defendant, so far as he was concerned, but not so the marriage of a female defendant.

Mitford's Equity Pl. (3d Am. ed.), 94.

But in case of a sole complainant suing *in autre droit*, if his interest entirely determined by death or otherwise, the suit did not abate, but merely became defective, as there was no change of interest which could affect the parties, but merely a change of the person in whose name the suit should be prosecuted.

Mitford's Eq. Pl., 103.
II Daniell's Ch. Prac., 1518, 1519.
Story's Eq. Pl., sec. 340.
Fletcher's Eq. Pl., sec. 828.

This distinction was material in determining the character of proceeding that was required to render the suit again perfect, or in such condition that it could properly be proceeded with. There were five methods known to English chancery practice for supplying the defects of a suit, or continuing it, if the defect caused it to be abated. These were (1) by supplemental bill, (2) by original bill in the nature of a supplemental bill, (3) by bill of revivor, (4) by original bill in the nature of a bill of revivor, (5) by bill of revivor and supplement.

Mitford's Eq. Pl., 98.
Story's Eq. Pl., sec. 326.

The character of proceeding required was of practical importance in determining to what extent the proceedings were opened up. If a mere supplemental bill was all that was necessary, the suit could proceed the same as if the original complainant had continued such.

II Daniell's Ch. Prac., 1519.

In the identical case now before the court it was thoroughly well settled under the English chancery practice that a mere supplemental bill was all that was necessary.

II Daniell's Ch. Prac., 1518.
Mitford's Eq. Pl., 103.
Beames' Pleas in Equity, 300.
Story's Eq. Pl., sec. 340.

The necessity for supplementary proceedings grew out of the rule that a court of equity would not act in the absence of a party affected by its decree, and the *evidence* it formerly required of a party's presence was his introduction through a formal pleading as a party to the record, although that was sometimes dispensed with.

See note, 4th ed., Mitford's Eq. Pl., p. 119.

It is important to bear this in mind, and we repeat that supplementary proceedings were merely for the purpose of assuring that the parties to be affected by the decree were before the court.

Wharam *vs.* Broughton, 1 Vasey, Sr., 180.

Bearing in mind this brief outline of the rules of English chancery practice, the history of the conception embodied in section 46 of the present bankruptcy act emphasizes the fact that it was designed, like the provision of section 21*e* already referred to, to render the law efficient and speedy in accomplishing its objects by preventing technical objections. A step in this direction was taken by section 67 of 6 George IV, chapter 16, afterwards reënacted in section 157 of the English bankruptcy consolidation act of 1849, 12 and 13 Vic., C. 106, which provides:

> "That whenever an assignee shall die, or be removed, or a new assignee shall be chosen, no action at law or suit in equity shall be thereby abated, but the court in which any action or suit is depending may, upon the suggestion of such death or removal and new choice, allow the name of the surviving or new assignee to be substituted in the place of the former, and such action or suit shall be prosecuted in the name or names of the said surviving or new assignee or assignees in the same manner as if he had originally commenced the same."
>
> II Daniell's Ch. Prac., 1512.

After the adoption of the act of 6 George IV it became customary to make the substitution as of course on mere *ex parte* motion.

See

Man *vs.* Ricketts, 7 Beavan, 484.
Bourne *vs.* Walker, *Id.*, 486.
Fort *vs.* Weston, *Id.*, 486.
Nouaille *vs.* Flight, *Id.*, 486-487.

And the same was the practice under the subsequent general act of 1852, which was intended to accomplish for the chancery practice similar reforms to those brought about by the common-law procedure act of the same year, the order being liable to be discharged by those against whom it was improperly obtained.

Gordon *vs.* Jesson, 16 Beavan, 440.
Jackson *vs.* Ward, 1 Giff, 30.
Lowe *vs.* Watson, 1 Sm. & Giff., 123.
Pickford *vs.* Brown, 1 Kay & J., 643.

In line with this legislation in England, and also with the policy of the general legislation of many States in this country, it was provided by section 3 of the bankruptcy act of 1841 that

> "No suit commenced by or against any assignee shall be abated by his death or removal from office, but the same may be prosecuted or defended by his successor in the same office."
>
> Remington on Bankruptcy, p. 1827.

In the act of 1867 the provision was as follows:

> "No suit pending in the name of the assignee shall be abated by his death or removal; but upon the motion of the surviving, or remaining, or new assignee, as the case may be, he shall be admitted to prosecute the suit, in like manner, and with like effect as if it had been originally commenced by him."
>
> Section 16, 1 Remington, p. 1801.

And in the present act it is provided as follows:

> "The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being

defended by such joint trustee alone or by such successor."

Bankruptcy act of 1898, sec. 46.

The object of all these provisions is manifest. They were intended, in respect to their subject-matter, to abrogate the highly technical doctrines whereby judicial empiricists had exalted the servant above the master by subordinating the administration of justice to mere rules of procedure, and the provision of the present bankruptcy act renders changes in the incumbent of the office of trustee immaterial so far as pending suits are concerned. Their prosecution or defense may be continued by the "successor in the same manner as though the same had been commenced or was being defended * * * by such successor." A change in the incumbent of the office *pendente lite* is thus of no more consequence than was a purchase *pendente lite* from a defendant. Such statutes are highly remedial and should receive, as they have already received, a liberal construction. It has been held, even without a statute, that there is no insuperable difficulty in continuing the prosecution of an action and recovering judgment in the name of a dead plaintiff, even in an action of tort which did not survive.

Cox *vs.* N. Y., etc., R. Co., 63 N. Y., 414.

And gross laches in failing to discover for two years what could have been ascertained at once from an examination of the records in the proceeding in bankruptcy was, of itself, sufficient, even in the absence of a statute, to deny the right to file such a plea in abatement.

See

James *vs.* Morgan, 36 Conn., 348.

General legislation similar to, or even less comprehensive than, section 46 of the bankruptcy act has been universally

construed to permit a pending suit to go on in the name of the original party, unless a request for substitution is made.

Wolfe *vs.* Pierce, 55 N. E., 872.
Manchester *vs.* Herrington, 10 N. Y., 164.
Pittsburg, etc., R. Co. *vs.* Martin, 41 N. E., 690.
Elliott *vs.* Teal, Fed. Cases, No. 4389.
French *vs.* Edwards, Fed. Cases, No. 5097.
Dundee Mortgage, etc., Co. *vs.* Hughes, 89 Fed., 182.
15 Dec. Digest, title "Parties," sec. 59 (2).
20 Ency. Pl. & Prac., 1037, 1029.
Kohn *vs.* Pauly, 106 Pac., 266.
Burns *vs.* Kennedy, 90 Pac., 1102.
Interstate, etc., Co. *vs.* Coal Co., 113 S. W., 1.
McCague Savings Bank *vs.* Croft, 115 N. W., 315.
Sykes *vs.* Beck, 96 N. W., 844.

See also
State *vs.* Bloxham, 42 Fla., text, 503-504.

The object of all such legislation is simply to make one succeeding to the rights of a party *pendente lite* a party himself and bound by the judgment or decree if he chooses to continue the litigation in the name of the party to the record, and thus abrogate the rule which made it imperative to bring the new party before the court by formal proceedings, so as to bind him by the result. The result being accomplished directly, the necessity for supplementary proceedings ceases, and a great variety of technical distinctions is thus obviated.

Such legislation expresses no new conception in law. The law was never over-particular about the names of the parties to the record. Indeed it often required a suit to be brought in the name of another than the real party in interest, and does to this day in certain cases.

Coogler *vs.* Rogers, 25 Fla., 853.

The name appearing on the record was never conclusive, and even if a wrong name were used the party suing or sued was equally bound by the result.

1 Black on Judgments, sec. 213.

L'Engle *vs.* F. C. & W. R. Co., 21 Fla., 353.

A name is nothing more than a means of ascertaining identity, and a party assuming the prosecution or defense of a suit was always bound by the result, whatever the names of the parties to the record. Further than that, *fictitious names* were universal in certain classes of actions, and John Doe and Richard Roe as parties to actions of ejectment were possessed of legal immortality unaffected by changes in the real parties interested in such suits. It has also been common practice to take no notice of the changes in personnel of official trustees pending litigation, of which many examples might be cited.

Section 46 of the bankruptcy act is in no sense revolutionary. On the contrary, it is responsive to the universally existing demand for the abolition of technicalities in procedure, and should be regarded with the highest favor by the court. The same situation presented in this case was before this court *in the absence of any legislation* similar to the provision of the bankruptcy act. George E. Bowden, as receiver of the First National Bank of Virginia, filed a bill in equity against a stockholder alleged to have made a collusive transfer to an irresponsible transferee in order to avoid liability. Testimony was taken and a decree rendered dismissing the bill in January, 1879. In June, 1878, Orson Adams had been appointed receiver instead of Bowden, but no suggestion of that fact was made of record, or proceedings taken to substitute him as complainant. After the decree an appeal was entered in the name of Bowden, the former receiver, and submitted in the Supreme Court. On the submission Adams moved to be substituted in this court as complainant and appellant in the place of Bowden "without prejudice to the proceedings theretofore had." The ap-

pellees first heard of the change of receivers when this motion for substitution was made in this court, and thereupon moved to dismiss the appeal on the ground that none was ever lawfully taken. The motion for substitution was granted, the motion to dismiss the appeal was denied, and the decree reversed with directions to the circuit court to enter a decree in favor of the substituted receiver as complainant.

Adams *vs.* Johnson, 107 U. S., 251.

See also

Thatcher *vs.* Rockwell, 105 U. S., 467.
Brown *vs.* Wygant, 163 U. S., 618.

The decision on the fourth appeal to the Supreme Court of Florida is conclusive of the contention now made, which was expressly considered and decided on that appeal.

Hull *vs.* Burr, 64 Fla., 83.

And it is not true that there must be either a decree of revivor on the supplemental bill, or a hearing and decree thereon before the Florida suit can be further prosecuted. A supplemental bill filed before decree is in effect, but an amendment to the original bill, and forms with it one record, so that the cause is heard upon the original and supplemental bills, unless, of course, there has been a hearing and decree on the original bill before the supplemental bill is filed.

Vigers *vs.* Audley, 9 Sim., 408.
Adams *vs.* Dowding, 2 Madd., text 60.
Wilkinson *vs.* Fowkes, 9 Hare, 193.
Mitford's Eq. Pl., 64, 75.
II Daniell's Ch'y Prac., 1539.
Sayle *vs.* Graham, 5 Sim., 8.
Fletcher's Eq. Pl., secs. 841, 844.
21 Ency. Pl. & Prac., 78, 82.
Aust *vs.* Rosenbaum, 21 So., 555.

VI.

Judgment in Ejectment.

A question of an entirely different character is suggested by the sixth assignment of error, and it is, perhaps, the easiest way to dispose of it by assuming the question is presented by the record, though we cannot see how it is, especially in view of the allegations of the twenty-eighth paragraph of the bill (Transcript, p. 15), which asserts, as a ground for interference by the Federal court of equity with the suit brought by the trustees that the bankrupt company still owned whatever title it had at the time of the adjudication. The assignment of error asserts that a judgment in ejectment in an ejectment suit against the bankrupt brought after adjudication, to which the trustee was not a party, and a previous resolution of the directors of the bankrupt, preclude the bankrupt and "defendants as trustees claiming under said company from asserting any interest in the properties" (Transcript, p. 47).

The other contentions presented by the appellants involve their claim of right to attack the *status* or capacity of the defendants to maintain the litigation in Florida as trustees of the bankrupt. In other words, they seek merely to have the Federal court of equity decree that the defendants are not *proper parties* to maintain the Florida litigation, without involving any question as to the *merits* in respect to the property in controversy. This assignment of error assumes as a predicate the lawful *status* of the defendants as trustees of the bankrupt, but asserts an estoppel, both against the bankrupt and its trustees, against any claim of title to the property in controversy in the Florida suit. It is apparent, therefore, that it assumes it to be a duty of the Federal court in Massachusetts to pass upon and decide the merits of the Florida controversy, of which the Florida court had prior jurisdiction, a claim that cannot be sustained on any prin-

ciple whatsoever. But the claim that the judgment in ejectment against the bankrupt, in a suit brought *after* adjudication, can bind the trustees is wholly without merit, and so the Supreme Court of Florida decided on the second appeal.

Hull *vs.* Burr, 61 Fla., 625.

It is not plain, in any event, that a judgment in ejectment would conclude an *equitable* right, nor could such a judgment in a suit instituted *after adjudication* conclude any right, in the absence of the party upon whom the equitable right devolved as of a date prior to the institution of the suit.

Conner *vs.* Long, 104 U. S., 228.
Rouch *vs.* Great Western R. Co., 1 Q. B., 51.
Logan *vs.* Stieff, 36 Fla., 473.
Winslow *vs.* Whiting, 47 N. Y., 261.
Barker *vs.* Goodair, 11 Vesey, 78.
In re Engle, 105 Fed. Rep., 893.
Ex parte Foster, Fed. Cases, No. 4960.
Barron *vs.* Newberry, Fed. Cases, No. 1056.

There is nothing better settled under the bankruptcy act than that a bankrupt in possession under claim of ownership at the time of adjudication holds as trustee for the bankruptcy court prior to the appointment of a trustee, whose title thereafter relates back to the date of adjudication.

Collier on Bankruptcy (9th ed.), 993.
I Remington on Bankruptcy, sec. 1807.
State Bank *vs.* Cox, 143 Fed. Rep., 91.
In re Gutman, 114 Fed. Rep., 1009.
In re Reynolds, 127 Fed. Rep., 760.
In re Rose Shoe Mfg. Co., 168 Fed. Rep., 39.
In re Schermerhorn, 145 Fed. Rep., 341.
In re Rosenberg, Fed. Cases, No. 12,055.
In re Granite City Bank, 137 Fed. Rep., 818.

There could be no object whatever in bringing this ejectment suit except to defeat the operation of the bankruptcy act, and it requires some hardihood to contend that a court of equity will assist in perpetration of a fraud on the bankruptcy act by decreeing that a judgment in ejectment in a suit brought after adjudication against the bankrupt alone shall conclude the trustees.

See *Ex parte* Foster, Fed. Cases, No. 4960.

We venture to say, moreover, that no possessory action, involving dominion over the *res*, can be brought in another court *after adjudication*, at least without the consent of the bankruptcy court, if then.

U. S. F. & G. Co. *vs.* Bray, 225 U. S., 205.
Acme Harvester Co. *vs.* Beekman Lumber Co., 222 U. S., 300.
Robertson *vs.* Howard, 229 U. S., 254.
Waters *vs.* Shinn, 178 Fed. Rep., 345.
White *vs.* Schloerb, 178 U. S., 542.
In re Hughes, 170 Fed. Rep., 809.
In re McMahon, 147 Fed. Rep., 684.
In re Noel, 137 Fed. Rep., 694.

While we cannot see how the effect of this judgment is in any way before the court on the present appeal, we have made these suggestions to show the ground of the decision of the Supreme Court of Florida on the second appeal, and to show that it was right, and to show further that "paper forms" in the guise of judicial proceedings are the basis of the claim of the appellants.

VII.

Other contentions of the appellants rest upon the erroneous propositions—

That the allegations of the petition for adjudication go to the jurisdiction of the bankruptcy court.

First Nat. Bk. *vs.* Klug, 186 U. S., 203.
Smith *vs.* McKay, 161 U. S., 355.
In re New England Breeders' Club, 169 Fed., 586.
U. S. *vs.* Morse, 218 U. S., text, 505.
Cooper *vs.* Reynolds, 10 Wall., 308.
Ill. C. R. Co. *vs.* Adams, 180 U. S., text, 34.
Noble *vs.* Logging Co., 147 U. S., text, 173.
In re First Nat. Bank, 152 Fed., 64.
In re Hecox, 164 Fed., 823.
In re Dempster, 172 Fed., 353.
In re Columbia, etc., Co., 101 Fed., 965.
In re Plymouth Cordage Co., 135 Fed., 1000.
In re Marion Contract Co., 166 Fed., 618.

That amendable defects in process and return go to the jurisdiction of the court.

Bryan *vs.* Ker, 222 U. S., 107.
Ambler *vs.* Leach, 15 W. Va., 677.
Griswold *vs.* Connolly, Fed. Cases, No. 5833.
Hill *vs.* Gordon, 45 Fed. Rep., 276.
Note 1, Am. & Eng. Ann. Cases, 923.

That it is a fraud for directors to be petitioning creditors.

In re Eureka, etc., Coal Co., 197 Fed., 216.
In re Rollins, etc., Co., 102 Fed., 982.

That it is an unlawful purpose for officers not to oppose an adjudication, although they can pass a resolution expressing willingness to have the corporation adjudged a

bankrupt, or make a general assignment for creditors, and can now file a voluntary petition.

West Co. *vs.* Lea, 174 U. S., 590.
In re Duplex Radiator Co., 142 Fed., 906.
In re Moench, 130 Fed., 685.
In re Moench, 123 Fed., 965.

That a Massachusetts corporation is not subject to adjudication in the State of its domicile.

In re United Button Co., 137 Fed., 668.
In re Matthews, etc., Co., 144 Fed., 724.
Guinn *vs.* Iowa, etc., R. Co., 14 Fed., 323.

That it is a fraud to entertain a particular view as to what constitutes an act of bankruptcy at variance with that entertained by the appellants.

Folger *vs.* Putnam, 194 Fed., 793.
In re Putnam, 193 Fed., 464.

That the validity of the claims of petitioning creditors is jurisdictional.

In re Plymouth Cordage Co., 135 Fed., 1000.
Millan *vs.* Exchange Bank, 183 Fed., 753.
First State Bank *vs.* Haswell, 174 Fed., 209.
Ryan *vs.* Hendricks, 166 Fed., 94.

Little will remain in the bill if the drapery of unfounded legal conclusions and characterizations is stripped away, as must be done.

Van Weel *vs.* Winston, 115 U. S., 228.
Ambler *vs.* Choteau, 107 U. S., text, 590.
Fogg *vs.* Blair, 139 U. S., 118.
Kent *vs.* Lake Superior Co., 144 U. S., 75.

And its charges are not leveled against those by whom the alleged frauds were committed, but against strangers, who are discharging a trust imposed upon them by the law,

and whose actions can wrong no one. If appellants own the properties in Florida, they will succeed in keeping them. If they do not, the bankruptcy court will administer them, and no one is complaining who can be injured in the slightest degree by the bankruptcy proceedings. Why should the Federal court in Massachusetts undertake to determine who are proper parties to the Florida litigation, when the complainants are bound to succeed on the merits in Florida, if the allegations of their bill are true? That is really what the controvery resolves itself into.

The decrees of both courts below were so obviously right from any standpoint that they must be affirmed, if the appeal is not dismissed for want of jurisdiction.

Respectfully submitted,

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TABLE OF CASES CITED.

In the Supreme Court of the United States

JOSEPH HULL, THE PRAIRIE PEBBLE PHOSPHATE COMPANY and THE SAVANNAH TRUST COMPANY,

Appellants,

vs.

ARTHUR E. BURR, FRANK L. SIMPSON and J. HOWARD EDWARDS as Trustees in Bankruptcy,

Appellees.

No. 767.

BRIEF IN OPPOSITION TO MOTION.

A casual reading of Appellants' bill of complaint will convince that jurisdiction of the District Court does not depend solely on diverse citizenship, and that the bill was not constructed on any such theory, though such citizenship is stated in the caption, Rec. p. 5.

STATEMENT OF FACTS OF THE BILL OF COMPLAINT.

The record consists of a bill in equity for relief, a general demurrer thereto and decrees of courts below dismissing the bill and their opinions.

The sole object of the bill is to quiet the title of plaintiffs to 440 acres of land in Polk County, Florida. Some personal property is involved but is of small value and need not be considered on this hearing.

The appellants were plaintiffs and appellees defendants in the courts below.

The bill of complaint is divided into twenty-nine sections.

The first nine sections show a perfect fee simple title to the property in the plaintiff, the Prairie Pebble Phosphate Company, herein called the Pebble Company. Such title, as so shown, is derived from Stewart & Meminger who conveyed to plaintiff Hull in May A. D. 1905. Hull conveyed to the Pebble Company early in June A. D. 1907 and in the same month and year the Pebble Company conveyed by deed of trust to the plaintiff the Savannah Trust Company to secure bonds of the par value of $1,800,000.

Hull took possession under his deed in May, 1905 and upon the conveyance to the Pebble Company it took possession, has held possession ever since, and prior to March 26, 1908, made improvements of the value of $75,000.

The Port Tampa Phosphate Company, a Massachusetts corporation, claimed to own an equity in the properties under a contract with Stewart & Meminger, and its directors passed a resolution in May A. D. 1905 under which it sold to Hull all equitable interest it ever owned, and the resolution directed Stewart & Meminger to deliver to Hull a good deed of conveyance "free and unencumbered." These facts are stated in the ninth section of the bill, where the entire resolution is set forth.

It is thus shown that the Tampa Company, the alleged bankrupt could not possibly have owned any interest in these lands or personal property after the adoption of said resolution and said conveyance to Hull and payment by him of the consideration of upwards of $13,300 as stated in the ninth section of the bill, and it has not since claimed any such interest.

Notwithstanding this, Hull hearing rumors that some creditors of the Tampa Company asserted that said Company still owned some rights in the lands, in order to set these rumors at rest began on November 28, A. D. 1905 and prosecuted in the Federal Court in Florida an action of ejectment against said Company to a final judgment, whereby it was adjudged in accordance with the statutes of Florida upon a verdict of a jury that Hull was the owner

of the fee simple title to these 440 acres of land and entitled to the possession thereof. That said judgment was in full force and effect and a copy thereof is made a part of the bill of complaint and filed as an Exhibit in the present suit, all of which appears in the tenth section of the plaintiff's Bill (Rec. p. 8-24).

In Florida by statute a person in possession of land may maintain ejectment against any person claiming adversely.

Thus a perfect title in the Pebble Company fortified by a Federal judgment in ejectment against the Port Tampa Company, under which the defendants claim as trustees, is stated in the first ten sections of the bill upon which to rest a decree to quiet title.

(Note: Hull is joined as co-plaintiff only because he is interested to support his conveyance to the Pebble Company. The Savannah Trust Company is joined because it has a lien on the properties under said deed of trust. In Florida every writing executed to secure the payment of money is a mortgage and only creates a specific lien on the property included in it. The Pebble Company is the real party entitled to the relief sought, in which is the legal title. Both companies are Georgia corporations.)

THE CLAIMS OF DEFENDANTS.

Their claim is that on the 27th day of November A. D. 1905 on an involuntary petition in bankruptcy in the District Court of Massachusetts the Port Tampa Company was duly adjudged a bankrupt by a decree of that court; that at the date of such alleged decree said company owned an equitable interest in the properties described in plaintiffs' bill; that defendant Burr was appointed a sole trustee in bankruptcy of the estate of said company on the 27th day of December A. D. 1905, and thereupon it is claimed such alleged interest in the properties vested, under the Bankrupt Act of 1898 in him, the said Burr, as such trustee.

Defendants further claim that on March 12, 1909 Burr resigned as trustee under his appointment on December 27, 1905, that his resignation was accepted and that subsequent to such resignation Burr and defendants Simpson and Edwards were appointed trustees of said alleged bankrupt estate, and thereupon said Company's asserted interest in the 440 acres of land and personal property vested in them as such trustees as of the date of November 8, 1905, the day the petition was filed.

Burr asserted such interest in him as trustee by a bill in equity in a State Court of Florida against the present plaintiffs as defendants on the 26 day of March A. D. 1908; and before any issues of fact and law were raised by defendants' pleading to the said bill he resigned; and on the 9th day of January A. D. 1912 the appellees, claiming to be such trustees, filed in said State Court a supplemental bill in equity praying for a decree reviving Burr's bill and making them parties plaintiff to said bill.

These claims and assertions of defendants, appellees here, are set forth in detail in Sections 11th and 12th of the present bill, which see (Rec. pp. 8 and 9).

THE CLOUD.

The facts and assertions stated in Sections 11th and 12th of the Bill constitute the cloud on the Pebble Company's title which plaintiffs by their present Bill seek to have removed.

The claim of defendants thus stated is denied and controverted on four distinct grounds stated in the Bill. First: That by giving to the deed by Stewart & Meminger to Hull and the said Federal Judgment in Ejectment against the Port Tampa Company, and to the said Resolution, their legal effect it is impossible that said Company could have owned any interest in these 440 acres of land on November 8th, 1905, the date the petition in bankruptcy was filed against that Company.

Second: That all of the said bankruptcy proceedings were null and void for want of jurisdiction of any act of

bankruptcy and of the person of the Tampa Company, of the Court of Bankruptcy.

Third: That if the alleged decree adjudging the said Company a bankrupt is not void the defendants' alleged appointment was void. This in the 26th section of the Bill, Rec. p. 14.

Fourth: That said decree was obtained by flagrant fraud and perjury, in fact and in law, perpetrated by pretended creditors who were officers of the alleged bankrupt, and that the defendants as the asserted representatives of such creditors cannot be permitted to derive any benefit or title from a decree obtained by fraud and perjury.

The facts constituting the above four grounds are stated in sections of the Bill numbered 13th to 26th inclusive. Rep. pp. 10 to 15.

DISCOVERY OF THE FRAUDS.

The last paragraph next preceding the prayer of the Bill avers that the plaintiffs did not discover and had no notice of such alleged frauds until the 14th day of March A. D. 1911. Rec. p. 16.

On demurrer the trial court below decreed a dismissal of plaintiffs' Bill, the Circuit Court of Appeals affirmed that decree, and from the decree of affirmance this appeal is prosecuted.

GROUNDS OF DECREES IN THE COURTS BELOW.

(A) The District Court based its decree on the theory and holding in legal effect (a) that the bankruptcy proceedings were not void for want of jurisdiction; (b) that the facts stated in the 26th section of the Bill claimed to establish that the appointment of defendants was void, were only irregularities; (c) that the proceedings in bankruptcy could not be attacked on the ground they were

procured by fraud; and therefore (d) that defendants possessed the character of trustees.

(B) As the defendants possessed the character of trustees the District Court held that the plaintiffs, appellants here, could not maintain in the Federal Court a bill to remove a cloud on title but must obtain relief as defendants in the suit in the Florida State Court mentioned in the present Bill. See opinion, p. 27.

(C) The Circuit Court of Appeals approved of the "Conclusions" and "reasoning" of the Judge of the District Court. Rec. pp. 27-28.

(D) But the Court of Appeals based its decree affirming the decree of the District Court on the distinct theory and ground; (a) that when the present bill was filed, there was a suit pending in a Florida Court of Equity of competent jurisdiction between the same parties that are parties to the present Bill, (they being reversed in the State Court); (b) that the "questions in the Florida Court are or may be exactly the same as we have here;" (c) and that the Federal Court below is prohibited by a Federal Statute, (presumably Section 720 R. S.) to grant a decree containing an injunction that is specially prayed for; (d) in legal effect, that the Federal Court in Equity had no jurisdiction to grant relief against a decree of the court of bankruptcy fraudulently obtained, but only against a judgment at law fraudulently obtained.

(E) On petition for Rehearing the Circuit Court of Appeals declared that its judgment was not based wholly on Section 720 R. S. but on the "broader principles" that "the authority of the Court which first acquired jurisdiction, the parties being substantially the same must prevail," "without regard to the fact that one court is a Federal and the other a State Court."

(F) On Petition for Rehearing the Court of Appeals declared it could not grant under the prayer for general relief a decree not containing any injunction awarding effective relief, because plaintiffs had not asked for such a decree in argument in either of the courts below. See opinion, p. 42.

Appellants insist in their assignments of errors that Section 720 has no application, and that each and every of the above enumerated rulings of the courts below are erroneous and prejudicial.

ARGUMENT OF MOTION TO DISMISS FOR WANT OF JURISDICTION.

Jurisdiction on the grounds of Federal questions appears upon the face of the Bill of Complaint as follows:

First: The 11th and 12th sections of the Bill of Complaint show that defendants assert ownership in these properties on the theory that they possess the character of trustees in bankruptcy under the proceedings in bankruptcy in the District Court below. Whereas the bill in sections 13 to 26 inclusive denies that defendants possess the character of trustees, on the several grounds enumerated in the above statement of facts to-wit: (a) that said proceedings were void for want of jurisdiction; (b) that if valid their appointment was void; (c) that said proceedings were obtained by perjury and flagrant frauds in fact and imposition on the District Court, and by frauds on the Bankrupt Act itself.

One of the controversies stated in the Bill is whether or not appellees are in fact and law trustees under the Bankrupt Act of 1898 and the proceedings under color thereof in the District Court below. And consequently there is the controversy shown by the Bill, whether or not under the said Act and said proceedings the title to any interest in the property vested in appellees. And such controversy arises under the laws of the United States. The assertion of such title created the cloud. These are Federal questions.

Rector vs. Bank, 200 U. S., text 411.

Their assertions that they are such trustees lies at the very basis of the cloud on the title to the property of

appellant, the Pebble Company, cast by the further assertion that they as trustees own an equitable interest in these properties.

RIGHT TO RAISE THE QUESTION.

We cannot see how a doubt can arise as to appellants' right to attack appellees' existence as trustees, for an adjudication that they are not forever terminates and settles all controversies between them and appellants in respect to these properties.

It is insisted that when a plaintiff sues in a representative character defendant can always defeat the suit by alleging and proving plaintiff does not possess such character and is not what he claims to be.

Such a plea is a plea in bar. Story's Eq. Pl., Sec. 728. Society etc. vs. Pawlet 4 Peters, 480; 1st Bates Fed. Pro., Sec. 267.

An averment and proof that appellees do not possess the character of trustees when their assertion that they do is the basis of a cloud on plaintiffs' title, to remove which is the sole object of this suit, is based upon as indisputable a ground and right as if appellees were in this suit suing appellants and the latter denied their representative character.

It is sufficient to maintain his bill for plaintiff to show that by acts "in pais" defendant has created a cloud on the title. Allen vs. Hawks, 136 U. S., 301, text 311-312.

Section 11th of the present bill shows assertions in pais that appellees claim to own an interest in these lands creating a cloud on plaintiffs' title, and by Section 12th it is shown that they assert that they are trustees in the supplemental bill in a Florida Court, by which they assert an ownership of such interest. It does not appear that any sound reason can be advanced to defeat the right of appellants by a bill in equity to aver and prove that appellees do not have the character of trustees, when such averment and proof are a sufficient basis upon which to

base a decree in proper form effective to remove the cloud on their title and thereby end all litigation.

It is believed to be a fundamental and a universal rule that in a bill in equity the plaintiff can set up every matter of fact and law that constitutes good ground for relief, (unless he has waived it.) And the question then is this: "Is it a good ground for any relief that appellees do not possess the character of trustees?" Or rather, does that controversy arise under any law of the United States so as to give this court jurisdiction to decide that and all other questions presented on the merits?

That is a Federal question.

It has been repeatedly held by this court that when a litigant, by his pleadings, insists that consistently with the laws of the United States his adversary is not entitled to recover a judgment against him, a Federal question is presented within Section 709 of the Revised Statutes.

Nutt vs. Knutt, 200 U. S., 12, text 19.

The plaintiffs at bar insist that consistently with the several provisions of the Bankrupt Act the defendants have not the character of trustees and are not entitled to assert that they are, which assertion enables them to create a cloud on the plaintiffs' property, and that this is a Federal question not distinguishable in principle from Nutt vs. Knutt supra, because to be exempt from having a cloud on the title of a party is as valuable a right as the right to be exempt from the recovery of a judgment. Especially so where as at bar the cloud manifestly defeats the free use and enjoyment by the Pebble Company of its property in its extensive business.

Whether the appellants' bill is held to be a collateral attack or a direct attack, the right to either attack on the ground that the bankruptcy proceedings are void for want of jurisdiction of the court of bankruptcy over the subject matter or person of the bankrupt is clear. And

such attack is made by the latter part of Section 12th of the bill and by Sections 13th to 19th inclusive. Rec. pp. 9, 10, 12.

The right to a direct attack by bill in equity on the ground that the alleged decree of adjudication was obtained by fraud and imposition is equally well settled. This is made by Sections of the bill numbered 13th to 26th inclusive.

It is fundamental that the decree of no court, however exalted, is exempt from attack for want of jurisdiction to render it, or on the ground it was obtained by fraud, at the suit of a stranger who is injured by the assertion of adverse rights claimed under such decree, unless he has waived his right to make such attack of which at bar there is no pretense.

The alleged bankrupt and appellees are citizens of Massachusetts and appellants could not bring their suit in any other Federal Court of Equity, for the obvious reason that in a suit of this nature personal service of process is indispensable to jurisdiction, and personal service could not be had in any other Federal Court. It is no valid objection to jurisdiction that the property in question is located in Florida, the cloud on which plaintiffs seek to have removed. The decree sought will act in personum.

If appellees do not possess the character of trustees by virtue of valid proceedings in bankruptcy, the bill alleging facts showing they were void and fraudulent, then appellants are entitled to a decree to that effect. And this is a Federal question.

Williams vs. Heard, 140 U. S., 529, text 535-536.

The bill shows to a judicial certainty that there never could have been any controversy between appellants and appellees in respect to the properties involved, if the latter had not asserted they were trustees under the Act of Bankruptcy of 1898 and by virtue of alleged valid judicial proceedings under that Act the validity of which appellants deny.

By inspecting that petition in bankruptcy, (Rec. p. 19) it appears that no jurisdictional fact of an act of bankruptcy is alleged and that consequently the asserted decree adjudging said Company a bankrupt is null and void.

That decree being null and void, appellees can have no existence as trustees, etc.

That petition copies, as an act of bankruptcy, the language of the statute declaring the suffering by a debtor of a creditor to obtain a preference by judicial proceedings, etc., to be an act of bankruptcy, but qualifies the language of the statute by adding that the preference was obtained "by process of attachment." That averment in the language of the statute is an averment of conclusions of law.

It is too well settled to require argument that in such a case an averment in the language of the statute states and tenders no issue of fact and is as a pleading a nullity. And it is equally well settled that the suing out of and levying a writ of attachment by a creditor on the property of his debtor is not an act of bankruptcy under the Act of 1898. Every Federal Court that has had the question before it has so ruled. The bill shows that no judgment at law or decree in equity was ever obtained against the Port Tampa Company, and that no assets of that Company were ever advertised for sale under any judicial process prior to November 8th, 1905, therefore no preference was obtained by judicial proceedings. See 14th section of Bill, Rec. p. 10.

And the petition in bankruptcy shows that the alleged process of attachment was issued on the 9th of October, 1905 only thirty days before the petition was filed. See Petition p. 10. It was impossible that a process of attachment issued on the 9th day of October could have become an irrevocable lien on the debtor's property on the 8th day of November of that year so as to diminish the debtor's estate for distribution among his creditors or become a preference.

The petition does not even allege that the process of attachment was ever levied on any property.

POINTS OF LAW.

(A) That the absence in the Petition of the jurisdictional fact of an act of bankruptcy renders the decree void is beyond dispute.

It is also averred in the Bill that the Company never committed an act of bankruptcy. Sections 14th and 15th of Bill. Rec. pp. 10-11.

(B) The Bill also avers that the court of bankruptcy never acquired before its alleged decree jurisdiction of the person of the bankrupt. Secs. 15th and 16th of Bill, Rec. p. 11.

(C) The Bill also avers that the alleged decree was not only procured by flagrant frauds and perjury and the fabrication of every jurisdictional fact, but was a fraud on the Bankrupt Act itself; in that the three petitioning creditors were all directors of the alleged debtor Company and one was its president, who under the law could not be petitioning creditors. And that in legal effect the petition in bankruptcy was a voluntary petition by the Company under the guise of being an involuntary petition. Because there were but five directors and three of them were the petitioning creditors who dominated the Company, who there y became "domini litis" of both sides of the proceedings in bankruptcy in which there was not and could not be any adverse party. See Sec. 14th of the Bill last part, Rec. p. 11.

In November, 1905 there was no Act of Congress under which the Port Tampa Company could be adjudged a bankrupt on its own voluntary petition.

(D) The Bill avers that two of the petitioning creditors did not have provable claims under the Bankrupt Act and that they have been disallowed by the Referee. See 22d Sec. of Bill, Rec. p. 13.

(E) The Bill in the 26th Section avers that even

though the decree was not void for want of jurisdiction the appellees' appointment was void in that,

(a) There was no vacancy in the office of trustee on the day and hour of their alleged appointment.

(b) That their appointment was by one creditor only and that no notice required by law was given to the other creditors of the called meeting of the creditors at which one creditor only attended and made the appointment.

(c) That their appointment was procured by fraud and collusion between the Referee, Burr and one creditor, Wills, who alone made the appointment and he was a director and treasurer of the alleged bankrupt company.

(d) And on other grounds stated in Section 26th of the Bill.

All the above facts showing that the appellees do not possess the character of trustees are admitted to be true by their demurrer.

A MATERIAL CONSIDERATION.

As the Bill shows that by force of the Federal judgment in the Ejectment suit and the Resolution of the Directors the Company could not possibly have had any interest in the property, the averments in the Bill that bankruptcy proceedings were resorted to by the Directorate for the sinister purpose and design of creating a trustee in bankruptcy who could attack the plaintiffs' title and vex and annoy them constitute material matter for consideration. See Sec. 12th last part of Bill, Rec. p. 9.

Thus a fraud was perpetrated on jurisdiction of the District Court, which cannot be sustained.

Riverdale Mills vs. Manfg. Co., 198 U. S., 199-200.

MERITS ON MOTION TO DISMISS.

The question whether or not the Appellees possess the character of trustees is, we think, an issue going to the

merits not before the court for decision on a motion to dismiss.

On this motion, the only question on this part of the Bill is: Does that issue arise under the laws of the United States, there being no pretense that the court below had not jurisdiction.

Hotel Company vs. Jones, 177 U. S., 449, text 453.

TITLE GOOD AS AGAINST THE BANKRUPT.

But the Bill in its first ten sections shows a perfect legal title in the Pebble Company fortified by a resolution of the Port Tampa Company by which it sold all its equitable rights to Hull that Company's grantor, and fortified by the Federal judgment in Ejectment. That title being good against the Port Tampa Company, the alleged bankrupt, and the creditors at the time the trustees' title to be trustees accrued, no interest in the properties passed to the trustees.

Thomas vs. Taggart, 209 U. S., 385 text 389.

Hewett vs. Berlin Machine Works, 194 U. S., 296, text 303.

It is perfectly clear upon the allegations of the Bill that the Port Tampa Company on November 8th, 1905, the date the petition was filed, owned no interest which it could have transferred or which could have been levied upon and sold under judicial process against the bankrupt within the intent and meaning of Section 70a of the Bankrupt Act. Id. 303.

Law vs. Welch, 139 Mass., 33.

PROPER FORM OF DECREE UNDER PRAYER FOR GENERAL RELIEF.

"It is ordered, adjudged and decreed that legal title and right of possession of the lands and personal properties described in the bill of complaint be and they are hereby established to be vested in the Prairie Pebble Phosphate Company, one of the plaintiffs, as against the defendants claiming as trustees of the estate of the Port Tampa Phosphate Company in bankruptcy; and that defendants claiming as such trustees have no right, title or interest in to or of the said properties or any part thereof."

A like decree was affirmed in Coder vs. Arts, 213 U. S., 228-245.

Such a decree would "not stay any proceedings" pending in the Florida Court within the meaning of Section 720 R. S., when the present suit was brought.

Nor would a decree that defendants are estopped by the Federal judgment from asserting any interest in the 440 acres of land.

AGAIN.

The Bill establishes that on August 9th, 1912, when the bill in the District Court was brought, the Bill by Burr alone filed in the State Court March 26th, 1908 had abated in the equity sense before issues thereon were made, by the acceptance of his resignation. Burr by such resignation was as dead in law as if he had been physically dead and could not thereafter appear in that cause nor in any other under his appointment in December, 1905, although he was subsequently appointed in 1909.

Taylor vs. Savage, 1 How., 286.

Parkhill's Admr. vs. Bank, 1 Fla., 116-127.

No further proceedings could be had in Burr's suit

and the State Court had no further jurisdiction of any question tendered by his bill. And the Florida Supreme Court has so decided in Hull et al vs. Burr, 62 Fla., 499-502-504. And in Parkhill vs. Bank, 1 Fla., 127-128.

Therefore when the present bill was filed in the District Court there was no suit pending in the State Court in which appellants by answer could set up the facts averred in their present bill, or to which the appellees were parties. The only proceedings then pending was the bill by appellees to revive Burr's suit and a decree of like character above suggested, by the courts below would not have stayed any proceedings in the State Court nor would the decree specially prayed have operated to stay any proceedings pending in the State Court to which appellees were parties. They could have still prosecuted their suit to revive to a final decree, and if in their favor they would then have been met by a plea in bar of such a decree of the Federal Court to the further prosecution of Burr's bill.

JUDICIAL NOTICE OF WHAT HAS BEEN DECIDED IN THE STATE COURT.

This Appellate Court is confined to the contents of the record. It cannot take judicial notice of any proceedings of the Florida courts not brought before it by proper pleadings.

Capitol City Bank vs. Hilson, 64 Fla., 207, text 222.

McNish vs. State, 47 Fla., 69.

Storm vs. U. S., 94 U. S., 76.

Hecht vs. Boughton, 105 U. S., 235.

Reference cannot be made on considering this cause to

pleadings and proceedings in the State Court and not made a part of the present record.

South Carolina vs. Wesley, 155 U. S., 542, text 544.

ANOTHER GROUND OF JURISDICTION.

2nd. Obviously both Burr's Bill and the Supplemental Bill were filed on the theory and claim that the said Federal judgment in ejectment did not estop and conclude them as trustees of the estate of the Tampa Company in alleged bankruptcy. And obviously appellees' assertions in pais of an interest in the 440 acres of land are based on the theory that such Federal judgment and resolution of the Port Tampa Company do not bar and estop them, and were in contempt of said judgment. Whereas by this Bill of the appellants it is equally obvious that appellants rely upon the said judgment as a bar to the assertion of any interest in said lands by said appellees as trustees.

Thus a controversy arises as to the effect of such Federal judgment and this is a controversy arising under a Federal law. If that judgment is held a bar it terminates the suit in a decree to that effect without considering any other question.

There can be no dispute that one who claims under and in privity with another who is estopped, is himself estopped. And there can be no dispute that defendants, as trustees in bankruptcy, claim under and in privity with the Port Tampa Company the alleged bankrupt.

And there can be no dispute that in actions of ejectment, fictitious parties were long ago abolished in Florida, and that in such cases a single judgment in ejectment concludes the defendant and all persons claiming by, through or under him.

Moreover the question whether this Federal judgment is a bar though the appellees were not parties to it de-

pends on the construction and application of the provisions of the Bankrupt Act. It is not wholly dependent upon common law principles.

It has been repeatedly decided that where a suit is brought against a person either before or after he has been adjudged a bankrupt, if brought before the trustee is appointed and qualified, a judgment in such suit for or against the bankrupt concludes the trustee whether he was a party to it or not; and this by force of the provision of the Bankrupt Act itself.

In such a case the trustee acquires all the title he has pendente lite and is bound by the judgment the same as a purchaser pendente lite. Even more so, because he is not a purchaser for value. In such case the alleged title of the trustee "falls" on him and accrues at the time he qualifies and consequently pendente lite.

Eyster vs. Gaff, 91 U. S., 524.

Johnson vs. Collier, 222 U. S., 538, text 540.

Knapp vs. M. Trust Company, 216 U. S., 545-557.

In the following cases the judgments were held to bind the trustee though rendered in suits brought after the adjudication in bankruptcy.

Burbank vs. Bigelow, 92 U. S., 179, text 181-182.

Holland vs. Morton, 123 Mass., 278.

Brecht vs. Dayton, 34 Minn., 214, s. c. 25 N. W., 348.

Johnson vs. Collier, 222 U. S., 538.

"A trustee is in no sense a bona fide purchaser for value."

Eastman vs. First National Bank, 116 U. S., 134-138.

But these question go to the merits.

In any event and view what effect should be given to this Federal judgment is a Federal question, and involves rights asserted under Federal laws and is a controversy arising thereunder.

As before stated, the Bill in its general scope is one to quiet the title to these lands in favor of the Prairie Pebble Phosphate Company, one of the plaintiffs and appellants. This Company shows by the Bill that it owns the fee simple title to the lands fortified by said judgment, and that it has been in possession since June 1907 and made improvements thereon of the value of $75,000 before Burr filed his Bill. See Sections 5th, 7th and 16th of the Bill. Rec. pp. 6-7.

In a very correct sense the present suit is to enforce the rights of the Pebble Company secured by said judgment, and the court below was called upon to enforce such rights by giving effect to such judgment. By dismissing the Bill that court has refused to enforce such rights. At least the same effect should be given it which it would have had if rendered by a Florida Court. Hancock National Bank vs. Farnum, 176 U. S., 640, text 645 and cases cited. And beyond doubt one judgment in ejectment in Florida concludes parties and privies.

THE PREMISES OF COURT BELOW.

The decision of the court below necessarily includes as its premise that the Federal Court has no power to decree that the appellees as trustees are estopped by the Federal judgment in ejectment against the Port Tampa Company and by the Resolution of its directorate from asserting the ownership of any interest in the 440 acres of land, because appellees have a proceeding pending in the State Court in which they expect to obtain authority from

that court to prosecute a suit in which such ownership will be asserted. The premise is untrue in law and the conclusion illogical.

The result is that the Federal Court in Massachusetts has refused to give effect to a judgment by a Federal Court in Florida. (See Riverdale Mills vs. Manfg. Co., 198 U. S., 196), which judgment was long prior to any suit in the State Court.

Thus it is shown that there is a controversy arising under the laws of the United States and the motion to dismiss should be denied on this ground.

Lovel vs. Newman, 227 U. S., 413, text 421.

Third: There is a third Federal ground of jurisdiction arising from the averments in the Bill that defendants derive their alleged character of trustees through frauds on the Bankrupt Act itself, committed as follows, to-wit:

The three petitioning creditors were directors and constituted a majority of the Company's directors and thereby they, impersonating the Company, became "domini litis" of both sides of the suit in bankruptcy and fraudulently made the proceedings to appear to the court to be involuntary whereas in legal effect they were voluntary, under a false guise of being involuntary. And the contention is raised by the bill of complaint that the three directors, one of whom was the President of the Company, were under the Bankrupt Act incompetent to be petitioning creditors even though they were in fact creditors. This is a Federal question. The alleged decree was therefore obtained through such collusion and imposition upon the court and the question whether such transaction was a fraud on the Bankrupt Act itself is a Federal question, and its solution depends upon the construction and application of said Act.

GROUND OF AFFIRMANCE.

The court below affirmed the decree of the District Court dismissing the bill on the distinct ground that a decree specially prayed for enjoining the defendants from setting up any right, title or interest in the property in any court or place could not be granted, because such a decree would enjoin the defendants from proceeding as plaintiffs in a suit pending in a Florida State court. See its opinion Rec. p. 38.

And on a petition for a rehearing the court below held that it could not grant a decree giving effective relief under the prayer of the bill for general relief because plaintiffs had not asked for such a decree in argument of the cause. See opinion Rec. p. 41.

It seems remarkable that a court of equity should refuse any relief, proper upon the case made by the bill, simply because in argument plaintiffs' counsel had not expressly asked for it, while insisting on a decree as specially prayed for.

ULTIMATE POINTS FOR ADJUDICATION.

An analysis of the bill establishes that there are but two ultimate points made upon which a decree quieting title is based.

1st. That defendants do not hold the office of trustees and therefore have no right to assert ownership of any interest in the properties.

2d. If it is adjudicated that defendants do hold the office of trustees, they are estopped by the Federal judgment and resolution from asserting such ownership.

BOTH COURTS BELOW TOOK THE VIEW THAT THE BILL PRESENTED A CONTROVERSY ARISING UNDER THE FEDERAL LAWS.

The District Court, as shown by its opinion, considered

and decided adversely to the plaintiffs that the defendants were lawfully exercising the office of trustees by deciding (a) That the court of bankruptcy had jurisdiction of subject matter and person, and that the decree of adjudication was not void. (b) That the grounds stated in the 26th section of the bill relied upon to establish that defendants' appointment was void were mere "irregularities." (c) That the plaintiffs could not have any relief on the ground that the decree of adjudication was obtained by fraud and imposition. See opinion of that court Rec. pp. 27 to 31.

The Court of Appeals approved of the "conclusions" of the District Court and of its "reasoning" that led to them. Therefore that court considered that there was a controversy under the Federal laws to-wit: whether or not defendants held the office of trustees in bankruptcy, and decided it adversely to the plaintiffs. See opinion of that court Rec. pp. 37 to 39.

And this court by the assignment of errors is asked to review the decisions of the courts below.

FEDERAL JUDGMENT.

But neither of said courts passed upon the controversy that said judgment estopped defendants as trustees upon the averments of the bill from asserting any interest in the 440 acres of land. If so estopped, then a decision quieting title necessarily follows. A failure to decide that question was a prejudicial error, and in effect denied plaintiffs their day in court.

ERRORS OF COURT BELOW.

The Appellate Court said that the questions raised in the present bill "may be raised in the State court." We suppose that suggestion is based on the assumption that Burr's bill may be revived and if it is then the appellants can by an answer thereto raise all the questions

raised by their present bill, and then the State court will have jurisdiction thereof. That is an erroneous view. There must be a suit pending in the State court between the same parties raising the same questions and for like relief when the Federal suit is filed, or Section 720 does not apply. This is self evident.

Watson vs. Jones, 13 Wall., 717-718.

Pendleton vs. Russell, 144 U. S., 645 to 647.

Moran vs. Sturgis, 154 U. S., 279.

Bush vs. Colbath, 3 Wall., 335, Syl. No. 9, text 345.

Hunt vs. N. Y. Cotton Exchange, 205 U. S., 323-339.

Upon the averments in Section 12 of the bill it is shown that the only suit that was pending in the State court was the suit to revive Burr's bill and the only possible issue of fact in that suit is whether appellees possess the character of trustees.

It is impossible for appellants in answer to the suit to revive to raise the questions raised in the present bill.

But Burr's suit may never be revived; that will depend upon the judgment of this court on writ of error to the State court should the latter decree a revivor.

It is very clear that a Federal court cannot abdicate and decline to exercise its jurisdiction of a case before it simply on the ground that the same question may be raised in future in a State court between the same parties. A litigant cannot be turned out of the Federal court on any such ground as that.

Burgis vs. Seligman, 107 U. S., 21, text 34, 225 U. S., 500.

Appellants at least were entitled to proceed in the court below until it could be shown that Burr's bill had been revived. It will be time enough to consider the effect of a decree reviving Burr's bill when it is obtained, and the court below should have considered that if the facts stated in the present bill are true such a decree of revivor never can be obtained.

In Fisk vs. U. P. R. R. Co., 10 Blatchford, 518, the court held that Section 720 did not apply to suits not pending in the State court when the Federal suit was begun.

In Live Stock Association vs. Crescent City, etc., Vol. 1 Abbott's U. S. Repts., 388, text 406, Justice Bradley discussed Section 720 and granted a decree under the prayer for general relief which contained an injunction "restraining defendants from commencing or prosecuting any other suits * * * than such as are now pending against the said plaintiffs." Id., 406-407.

In Watson vs. Jones, 13 Wall., 679, text 715-716, the court said in order to defeat a second suit: "The identity of the parties to the case made and of the relief sought should be such that if the first suit had been decided it could be pleaded in bar as a former adjudication." "* * This relief must be founded on the same facts." Id. 715.

Under the prayer for general relief in that case p. 720, the court decreed substantial relief. See decree p. 699, affirmed p. 735.

It is also true that if appellees should fail to revive Burr's abated suit, they can bring a new suit unless it should be adjudged that they are not trustees, but the fact that they may bring such new suit does not make Section 720 applicable. A decree of revivor would in respect to time put appellees in court as parties to Burr's suit, the same as if they had brought a new suit as of the date of such decree of revivor and Section 720 does not apply.

Section 720 does not apply so as to prohibit the Federal Court in order to protect plaintiffs' rights under Federal judgment, from enjoining proceedings in the

State Court, commenced long subsequent to said judgment.

198 U. S., 196-197, 18 How., 262-263.

French Trustees vs. Hay, 22 Wall., 250, 257.

MOTION TO AFFIRM.

We understand that motion to affirm will not be entertained when the court holds it has jurisdiction, unless the case on the merits is frivolous or the questions on the merits have been so clearly already decided in prior cases that appellants are not entitled to an argument on the merits. And there must be color of motion to dismiss.

Tested by that rule the motion to affirm cannot be entertained. This court has never decided that the facts stated in this bill afford no ground for a decree quieting title.

This court has never decided that the assertion by persons that they are trustees in bankruptcy, when in fact and law they are not, followed by assertions that they own an interest as such trustees in plaintiff's property does not create a cloud. Nor has this court ever decided that trustees in bankruptcy are not estopped by a Federal judgment in ejectment against the bankrupt in a suit brought against him prior to their appointment. Here the suit was brought and the judgment was recovered three years before appellees pretended appointment.

REVIEW OF APPELLEES' BRIEF.

To support their motion to dismiss they cite six cases in this court. Part of them were direct appeals from the Circuit Court and have no application. All of them go to the point that jurisdiction does not exist simply on the ground that the title to the property involved in a suit originated under a Federal law, etc.

But at bar there is no attempt made in the bill to establish that any of the parties to this suit derive or claim their title to the property originated from a Federal law. The questions raised are wholly different. Both and all parties to this suit claim through Stewart and Meminger, as the common origin of this title to property.

First: Appellees cite no case where the questions on the merits of the present bill have been decided adversely to appellants, therefore it is not a frivolous appeal.

Second: They assert that the sole object of the present bill is to enjoin a pending suit in a State court. Plainly that is not true. Its sole object is to obtain a decree quieting plaintiff's title. And it has been shown this can be done without staying any proceedings in the State court within the meaning and intent of Section 720 R. S. or rules of comity.

Appellees contend that the appellants cannot be permitted to raise the question that they are not trustees and do not possess the character of trustees because Section 21e of Act of 1898 prohibits their doing so.

Their contention is: that the clause in that section to-wit: "A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt" precludes all judicial (a) inquiry into the invalidity of the bankruptcy proceedings, (b) or as to whether or not all such proceedings were procured by fraud and imposition, (c) or if valid, all inquiry into the question whether or not the alleged appointment of defendants as trustees was void as claimed in Section 26 of the bill, conceding all prior proceedings valid. All three of those question (a), (b) and (c) are raised by the bill.

The proposition is a startling one for if sustained it tears up by the roots the valuable and time honored principles that when a claim is based on the decree of another court inquiry can always be made into the jurisdiction of that court to render it, especially at the suit of a stranger who is injured by such decree.

It also tears up the principle that anyone so injured can raise the question that such decree was obtained by fraud and imposition.

Section 21e furnishes no ground for any such contention. All Congress has done by that section is to state the evidence of the vesting in a trustee of the title to all the property bankrupt had in lieu of a deed of assignment under the Act of 1867.

But there must be, (a) a bankrupt by virtue of a valid decree or the title of the bankrupt to his property is not disturbed; and (b) there must be a trustee under a valid decree and under a valid appointment before the title to any property vests in him, and (c) there must be a referee to whom the case has been referred.

The common law rules of evidence by which the validity of judicial proceedings if assailed is proven, to-wit: the complete original record thereof or a certified transcript thereof are not abolished by this section. The validity or invalidity of such proceedings can only be established by such record.

In and by this section, Congress legislated as to what shall be evidence of the vesting in a trustee of the title to the bankrupt's property. It does not purport to legislate upon what shall be evidence of the validity of the appointment of a trustee or the validity if assailed of a decree upon which such appointment can rest.

Considering the other sections of the Act of 1898 in connection with Section 21e it is obvious that this section was based on the assumption that the debtor had been adjudged a bankrupt by a valid decree, and that a trustee had been appointed by creditors qualified to appoint him, or by order of the court of bankruptcy.

It says in substance that when there is a trustee, meaning one under valid proceedings, then a copy of the bond shall be conclusive evidence of title in him to the properties. At bar there is no controversy that if defendants are trustees the title to the property the bankrupt owned vested in them. That is not in this suit and cannot be in any suit a disputed fact for judicial decision.

The disputed facts at bar are that there is no bankrupt under any valid decree, and that defendants do not have the character of trustees. And the proposition is beyond denial that Congress has no power to declare what shall be conclusive evidence of a disputed fact arising in judicial proceedings either in the Federal or State courts.

To construe this section 21e as appellees contend would clearly render it unconstitutional. Cooley on Const. Lim., 7th Edn., pp. 526-527 and cases cited. It would deprive the plaintiffs of due process of law. Id., note 1.

Chicago R. R. Co. vs. Minnesota, 134 U. S., 418, text 456-7.

IN REM.

Second: The second contention of appellees in their brief is that bankruptcy proceedings are in the nature of proceedings in rem and bind the world. No such proposition is supported by any one of the cases cited in their brief. The contrary is ruled in one of the cases cited, Munson vs. Williams, 213 U. S., 453, text 455, where the court said: "The adjudication put the two brothers into bankruptcy for the purpose of administering whatever property there might be (of the bankrupt), as against the world. But it did not establish the facts upon which it was founded, no matter how close the connection, except as against parties entitled to be heard."

Citing Tilt vs. Kelsey, 207 U. S., 43-52.

It is idle to contend that Hull was "entitled to be heard" upon the question whether that Company should be adjudged a bankrupt. If he had had notice and filed a petition setting up that he owned certain property in Florida his petition would have been promptly dismissed on the ground that it was no concern of his whether the Company should be adjudged a bankrupt.

Third: Appellees' brief reviews the legislation in England and the decision of courts based thereon.

Such review may be deemed a brilliant exhibition of professional learning but it is utterly irrelevant to the point under discussion and furnishes no aid in respect to the meaning and effect of Section 21e.

Fourth: It is idle to contend as suggested by appellees' brief that either of the plaintiffs, all being strangers to the bankruptcy proceedings, could have had a review in the Court of Appeals under Section 24b either by appeal or petition to review.

The bankruptcy proceedings did not concern the plaintiffs as owners of property in Florida; until appellees by their conduct, cast a cloud on it.

IRRELEVANT CONTENTION.

Fifth: Appellees in their brief invoke the application of Section 1, Article 5 of the Constitution to decisions of the State Court. And they contend under this that interlocutory judgments of the State Court on interlocutory appeals are final and conclusive upon every question that court has decided on such appeals. They cite 21st Fla. 386 and 57 Fla., 120. All the courts decided in these cases is that on a second appeal points decided on a former appeal become the law of the case. But they only become the law of the case in the State Court. But the Florida court has also frequently decided that the rule as to the law of the case has no application on a second appeal unless the facts are the same on both appeals.

JUDICIAL NOTICE.

This court cannot take judicial notice of any point the State Court has decided unless it appears in this record.

RES ADJUDICATA.

If defendants claim that any point has been decided

in the State Court that has become res adjudicata, they must set it up in a plea or answer and thus give appellants an opportunity by proper pleading to show that there has been no such adjudication, or that the facts upon which it was based were materially different. "No question becomes res adjudicata until it is settled by a final judgment." 1st Freeman on Judgments, Sec. 251. And it must be upon the merits.

There can be no pretence that there has ever been in the State Court any decree either final or interlocutory that these defendants have the character of trustees or hold that office.

Sixth: Appellees say "the complainants' bill is barred by laches apparent on the face of the bill."

The bill shows in Section 12th that these defendants never asserted they were trustees until January 9, 1912, the day they filed their supplemental bill. Plaintiffs could not and had no occasion to deny they were trustees until they filed that supplemental bill. The present bill was filed in the court below on August 9, 1912 but seven months after said supplemental bill was filed.

Burr as sole trustee under his appointment in December, 1905 brought no suit asserting that he was a trustee until March 26, 1908. See 12 Section of Bill. And Burr resigned on the 12th day of March A. D. 1909 less than one year after he sued. The present defendants cannot avail themselves of the fact on the point of laches that the plaintiffs did not attack his character as trustee before he resigned.

DISCOVERY.

The latter part of the present bill next preceding its prayer shows that for some time plaintiffs assumed that the allegations in Burr's bill in respect to the validity of the bankruptcy proceedings were true and were misled thereby, and that they did not discover the invalidity of such proceedings until the 14th day of March A. D. 1911.

The record of these proceedings was in Boston, plain-

tiffs resided in Georgia and their counsel resided in Florida. Therefore any claim that the doctrine of laches applies is frivolous.

Seventh: Appellees suggest that the attack upon their character as trustees is matter in abatement and courts do not favor such attacks unless promptly set up where innocent parties' rights may be affected. It is well settled that the denial in the bill of plaintiffs' character as trustees is matter in bar.

No length of time bars inquiry into a fraudulent transaction where no innocent parties parting with value relying thereon have become involved. As to the suggestion that there may be some innocent persons who may be injured by a decree that appellees have not the character of trustees, the answer is that there cannot be any such innocent persons unless some creditors of the Port Tampa Company are such. Those who participated in the frauds set forth in the bill cannot be heard to say they are innocent parties. And these defendants constituted by fraudulent proceedings, cannot claim to represent the creditors who were not parties to the fraud. And by force of the Federal judgment and the resolution of the Board of Directors every creditor of that Company, and all trustees in their behalf if there were any, are estopped to assert that the Company owned any interest in those properties at the time the petition in bankruptcy was filed. Therefore there can be no innocent persons who can suffer any injury by an adjudication that the defendants are not trustees as against these appellants. And it does not appear from this record that the Port Tampa Company owned any property on the 8th day of November A. D. 1905. If it did, a decree quieting plaintiffs' title will not preclude defendants from asserting title to such property if the said Company does not object.

PESTIFEROUS.

Eighth: Appellees refer to volumes of the Florida Court to show that there has been some litigation between

some of the present parties. If the court is curious to read those cases it will be convinced that the efforts to cast and continue a cloud on plaintiffs' title by garbled statements of facts have become pestiferous.

There is no color for the motion to dismiss. And there is no pretence that the appeal was taken for delay only.

Appellees have failed to establish any plausible ground to refuse appellants a hearing on the merits of their assignment of errors.

ADDITIONS TO APPELLEES' BRIEF.

Since a copy of Appellees' brief was received the following authorities have been added thereto, and some new points:

Herbert vs. Crawford, 228 U. S., 204.

We cannot see the application of any point decided in that case to the case at bar on the motion to dismiss or affirm.

Robertson vs. Howard, 229 U. S., 354.

U. S. F. & G. Co. vs. Bray, 225 U. S., 205. And the same is true of these two cases.

It is not doubted that the Court of Bankruptcy in Massachusetts could order a trustee under a valid decree in bankruptcy, upon a proper application to sell any alleged interest of the bankrupt in property in Florida. There is no such controversy here on these motions.

EXCLUSIVE JURISDICTION OF THE COURT OF BANKRUPTCY.

If appellees contend that the court of bankruptcy in Massachusetts had exclusive jurisdiction to decide whether or not the alleged bankrupt (the Port Tampa

Company) owned any interest in these properties located in Florida, on a petition by a trustee, then the State Court of Florida had no jurisdiction of Burr's bill, and even though a decree of revivor of that bill should ensue, it would create no obstacle to a decree in the court below for the appellants as adverse claimants quieting their title. For Section 720 R. S. would not apply to a case where the State Court had not jurisdiction of a cause pending when this Federal suit is brought.

But there is nothing in this record suggesting that any trustee ever applied to the court of bankruptcy for an order for the sale of the bankrupt's alleged interests in these properties in Florida.

THE FLORIDA SUIT DID NOT ABATE.

(A) Under this head appellees contend at some length that the suit by Burr as sole trustee in the Florida Court did not abate by the acceptance of his resignation as stated in Section 11 of the bill.

The question of abatement of Burr's bill in the State court is one of local law.

> Martin vs. Baltimore & Ohio R. R. Co., 151 U. S., 673.

The Florida Supreme Court has decided that on Burr's resignation his bill abated, (in the equity sense of the word) and that no further proceedings can be had on that bill until Burr's successors have been made parties.

> Hull et al. vs. Burr, 62 Fla., 499, 502, 503.

That decision is not only the law of the case but we think res adjudicata. It is final on that point.

Therefore the citation of the English cases is useless. The have no application. It is purely a question of local law.

(B) The Appellees' brief embraces a contention that

they became parties to Burr's bill ipso facto on their appointment as trustees, and that appellants the defendants named in Burr's bill have no right to be heard in opposition thereto.

But in Hull vs. Burr, 62 Fla., 504, on petition for a rehearing the court held that such right to be heard does exist. And this right includes the right to put in issue the allegation that the appellees, plaintiffs in the Supplemental Bill, are trustees. Id.

This court has also ruled the same way, and that a decree of revivor is final and the right to resist it is clear.

Terry vs. Sharon 131 U. S., 40, text 46.

Thus the attempt to answer the contention that no suit was pending in the State Court when the present bill was filed in the court below, within the meaning of Section 720 utterly fails. Calling it a "trivial proposition" is not a judicial mode of disposing of the question that Burr's bill abated by his resignation.

Section 46 of the Bankrupt Act, quoted in Appellees' brief under letter V. lends no support to the view that Burr's bill did not in the equity sense abate. The word "abate" in that section is employed in its common law sense, that is, that by "death or removal" of a trustee, the vitality of the suit is not wholly destroyed, "but the same may be proceeded with * * * * by his successor in the same manner as though the same had been commenced * * * * * by such successor."

But there must be some procedure on notice to defendants in the abated suit to determine whether those claiming to be successors are successors. Appellees have chosen a supplemental bill as the correct procedure, as stated in the 12th Section of the present bill, Rec. p. 9. And in Hull vs. Burr et al. 64 Fla., 83, text 87 the court held such a bill "was the proper procedure," citing authorities.

FEDERAL COURT BOUND.

No doubt it is for the State Courts to determine the proper mode of determining who are, and of making the successors parties to a suit in the State Court and the Federal Court is bound by such determination as to the mode of procedure.

REVIVABILITY.

(C) The question of whether Burr's bill can be "revived" is entirely different from the question of abatement.

Section 46 of the Bankrupt Act does not expressly nor by necessary implication provide for the revivor of a suit begun by a "resigned trustee." It provides only for suits begun by a trustee who has died or is removed, "death or removal." A trustee who has resigned is neither "dead" nor "removed." "Removed" means removed on complaint of creditors, by an order of court after a judicial hearing, as provided for in the Bankrupt Act.

LEGISLATIVE INTENTION.

Manifestly Congress deemed it unnecessary to provide for the case of a "resigned trustee," because the Court of ankruptcy has that matter under its own control, and would not permit a trustee to resign where the interests of the estate required him to continue to execute his trust.

Collier on Bankruptcy, treating of Section 46, declares that it is "doubtful" if Section 46 applies to a suit brought by a trustee whose resignation has been accepted.

If Congress did not intend, as above suggested, then it is a clear case of "a casus omissus" in legislation. And this court has frequently ruled that it will not by judicial legislation supply the defect of "a casus omissus" in legislation however manifest it may appear. No case cited by appellees at all applies to the question of revivability under Section 46 except Hull vs. Burr, 64 Fla., 83,

text 87, citing State vs. City of Newark, 27 N. J. L., 185 and Scofield vs. The United States, 174 Fed. Rep., p. 1.

But this is a Federal question and this court is not bound by that decision of the Florida Court. That decision of the Florida Court is a mere arbitrary dictum and 27 N. J. L. and 174 Fed., the two cases it cites, lend no support whatever to such a construction of Section 46. Neither of those cases refers to that section and they do not even discuss the point that "a casus omissus" will not be cured by judicial legislation.

The Florida Court "by main strength" declared Section 46 embraced the case of a suit abated by the resignation of a trustee.

64 Fla., 87.

It is not a question of the power "of appointment" to fill a vacancy as that court held, (Id. 87), but a question of the right of the subsequently appointed trustees to revive the abated suit. The two questions are wholly dissimilar.

In Schreiber vs. Sharpless, 110 U. S., 76, text 80, the court said: "Whether the action survives depends on the substance of the cause of action, not on the form of proceeding to enforce it."

From Sections 11 and 12 of the present bill it appears that "the substance of the cause of action" set up in Burr's bill is whether the alleged bankrupt the Tampa Company "owns any interest" in these properties in question.

We add it is a debatable question whether Section 46 binds or applies to a State Court, because no Federal Statute has "created the cause of action" in the case at bar. We are inclined to the conclusion that Section 46 applies only to the Federal Courts. But protracted argument on these questions, on these motions is out of place.

VI.

FEDERAL JUDGMENT IN EJECTMENT.

(D) Appellees under this head make a prolix contention as to the effect of the Federal judgment in ejectment. They cite Hull vs. Burr, 61 Fla., 625 to the point that the trustee was not bound by that judgment "because he was not a party defendant to it." As already shown that decision was on an appeal from an interlocutory decree, and is in the teeth of the judgment of all other courts State and Federal, that have had the question before them. And of course this court is not in any way bound by that Florida decision, and it was on a different state of facts.

EQUITABLE RIGHT.

(E) They cite authorities to the point that the judgment in ejectment does not conclude the trustees as to any equitable interest the Port Tampa Company owned in the 440 acres of land. The bill avers in Section 9 and the demurrer admits, that said Company by resolution sold to Hull all the equitable rights it ever owned in these properties. That resolution is conclusive until by an answer it is shown to be inoperative.

POSSESSION.

(F) Point is made that a "bankrupt in possession" at the time of adjudication "holds as trustee for the bankruptcy court prior to the appointment of a trustee." The bill avers in Sections 3, 4, 5 and 6, and the demurrer admits that the alleged bankrupt has not been in possession since the month of May A. D. 1905.

The authorities cited in Appellees' brief as to rights arising from possession have therefore no application either on these motions nor on the merits.

Giving effect to the deed to Hull and to the Federal

judgment and Resolution of the directorate of the Tampa Company if that Company had been in possession of these properties at the time of the alleged adjudication, November 27, 1905, it was a possession at the will of Hull without color of other right of possession.

Eyster vs. Gaff, 91 U. S., 524; Johnson vs. Collier, 222 U. S., 538 text 540; Burbank vs. Bigelow, 92 U. S., 179 text 181-182 are conclusive of the right of Hull to sue the Tampa Company in ejectment before any trustee was appointed and of the jurisdiction of the Federal Court of that suit.

ASSUMPTION.

Much of Appellees' brief is based on the "assumption" that the alleged bankrupt owned some interest in these properties that could pass to a trustee whereas by the admissions of the demurrer that Company owned no interest whatever and the court of Bankruptcy upon the averments of the bill never acquired any pretense of jurisdiction over any of these properties.

Upon the averments of this bill the proceedings in bankruptcy by the officers of the Tampa Company were a blackmailing scheme to extort money from Hull and his grantee.

VII.

Under this head appellees seem to contend that an ajudication in bankruptcy cannot be attacked by showing that no act of bankruptcy was alleged in the petition, or by showing that every jurisdictional fact in the petition was false and deliberately fabricated, and an imposition on the court. The remainder of their brief is irrelevant to the present motions. Much of their brief ignores the facts alleged in the bill and is devoted to argument of questions wholly different from those raised by the demurrer's admission of those facts.

JUDGMENT OF FLORIDA COURT.

Appelees contend that the decision of the Florida Court that the Federal judgment did not conclude a trustee was right. It has already been shown that it is contrary to the decisions of this court and every other court, which have followed Eyster vs. Gaff supra. The Florida Court on the same interlocutory appeal decided that the decree of the court in Massachusetts adjudging the Tampa Company a bankrupt (assuming it was valid) by its own operation placed all the property in Florida it claimed to own in "custodia legis" of the Court of Bankruptcy in Massachusetts. See Hull et al. vs. Burr, 61 Fla., 629, and for that reason the plea of the Pebble Company, Hull's grantee, that it was an innocent purchaser was bad.

And on the same appeal the Florida Court held that "admitting that the bankrupt is bound by that judgment" (the Federal judgment), the trustee was not bound by it though the action in which the judgment was rendered was brought before the trustee was appointed.

Id., 625, Syl. No. 4 text 628.

After such absurd decisions, the imperilled rights of the appellants justified their resort to the Federal Court.

It is only fair to say that such decisions of the Florida Court were based on the assumption that the 440 acres of land were in the possession of the Tampa Company at the date of the alleged adjudication. This is shown by the report of the case on appeal from an order overruling a demurrer to Burr's bill.

Hull et al. vs. Burr, 58 Fla., 442 near bottom.

Whereas the present bill avers that Hull and his grantee have been in possession ever since May A. D. 1905.

In Dallam vs. Sanchez, 56 Fla., 779 Syl. 5, text 785 near bottom and 786, a declaration in ejectment under the

statute, averring the defendant was in possession is not an admission he was in possession. Id. 786.

It is also proper to admit that the facts in other respects before the Florida Court were not the same as stated in the present bill.

Of course Burr's bill did not mention the Resolution of the Directorate whereby all interests the Tampa Company ever had were sold to Hull.

This is shown by the statement of facts in the report of the case in 58 Fla., 433 et seq.

Still it is plain the Florida Court wholly disregarded Eyster vs. Gaff, Burbank vs. Bigelow supra, and other judgments of this Court upon which the present appellants relied.

VOID JUDGMENT CURABLE BY AMENDMENT.

Appellees admit, at least impliedly, that the bankruptcy proceedings were void for want of an allegation in the petition of the jurisdictional fact of an act of bankruptcy, and of the person and suggest that such are amendable defects. Whereas a void judgment for want of jurisdiction is forever void. No amendment of the pleadings, supplying the jurisdictional facts, can render it valid, but such an amendment can only lay a foundation for a subsequent valid decree

Logically this must be so. Authorities cited in 2 vol. Enc. of Pl. & Pr. pp. 653 to 655, and notes.

The exact point was decided in the bankruptcy case of In Re Lady Byran Mining Co. 2 Abbotts C. C. Rep. (9 Cir.), 527, text 529-530, opinion by Justice Sawyer.

ATTACHMENT.

Both courts below have decided that the suing out and levying by a creditor of a process of attachment on the property of his debtor is not an act of bankruptcy.

Parmenter Mfg. Co. 38 C. C. A. 200, 201, opinion by Justice Putnam.

In Re Crofts Riordon Co., 185 Fed., 931, opinion by Judge Dodge.

Collier on, 9 Edn. pp. 90 to 94 where many authorities are cited.

FRAUD.

Appellees suggest that obtaining the decree in bankruptcy by fraud and perjury by the officers of the Company, as alleged in the bill, was not unlawful because they could have admitted a willingness on the part of the Company to be adjudged a bankrupt. This is lamentable logic, as no such willingness is alleged in the petition as an act of bankruptcy, to give the court jurisdiction. Besides, if the facts stated in the bill showing its assets exceeded its liabilities by $80,000 are true, such an admission would have been a fraudulent act, and an imposition on the Court.

COMPANY NOT SUBJECT TO ADJUDICATION IN MASSACHUSETTS.

Appelees suggest that appellants contend that a Massachusetts corporation is not subject to adjudication in the State of its domicil.

Appellants do not so contend. They contend that the bill avers that this Tampa Company never did any business authorized by its charter in the State of Massachusetts and that all the assets it ever claimed to own were located in Florida.

See averments Rec. p. 9 and Section 17 pp. 11 and 12.

Upon those averments appellants do contend that the jurisdictional fact of doing business for the greater part of six months in Boston, as averred in the petition, was false and known to be false by the petitioning creditors,

all of whom were directors. If this Court is at liberty to read Hull vs. Burr as reported in 58 Fla., p. 433 et seq. and especially paragraphs third, p. 435 and (a) p. 442, the court will see that Burr in his bill admits that all the business it ever did and all the assets it ever owned were located in Polk County, Florida.

Upon these admissions and averments in the present bill it is too plain for argument, that the only court having jurisdiction to adjudge this Company a bankrupt, if it had committed an act of bankruptcy, which the present bill denies, was the District Court for the Southern District of Florida.

APPELLEES DID NOT COMMIT THE FRAUD.

Appellees make the point that they as trustees did not commit the frauds alleged, and that they have the right on behalf of creditors to consummate the fraud. This is a contention that the officers of a corporation under the guise of being creditors, can, by flagrant frauds and imposition on the court procure a decree in bankruptcy, and obtain its benefits, because the trustees are innocent of any fraud. We think a court of equity will turn the face of flint against such a contention. Upon the averments in Section 29 of the bill, Rec. 15, Burr and Simpson knew of the frauds before they were appointed. They are not in court with clean hands.

Manhattan Co. vs. Wood, 108 U. S., 218, text 227.

"A proceeding like this is against good conscience and good morals and cannot receive the sanction of a court of equity."

Wheeler vs. Sage, 1 Wall., 530 at bottom.

Kitchen vs. Rayburn, 19 Wall., 263.

PARTIES.

The appellees, claiming to be trustees, are the only necessary parties defendant, and their beneficiaries are not necessary parties.

Kerrison Assignee vs. Stewart, 93 U. S., 155, text 158-160.

Vetterlain vs. Barnes, 124 U. S., 169, text 172.

Story's Eq. Pl., Sections 141, 149, 150.

PAPER FORMS.

Upon the averments of this bill, admitted by the demurrer, the entire bankrupt proceedings were mere "paper forms," without vitality and void.

Lord vs. Vezie, 8 How., 251, text 256.

South Spring * * * Mining Co. vs. Amador * * * Mining Co., 145 U. S., U. S., 300.

12 Vol. Enc. Pl. & Pr., pp. 167-168.

Upon the facts averred in the bill, the conclusion is inevitable that the officers of the Tampa Company entered into a conspiracy to procure by fraud, deceit and perjury the alleged decree in bankruptcy, knowing that there was no foundation in fact for such proceedings.

Both the courts below seem to have utterly failed to comprehend the scope and character of appellants' bill.

CONCLUSION.

The appellants had the Constitutional right to resort to the Federal Court for relief, and to a decree on the

merits of their bill even though another suit for the same or different relief was pending in the State Court.

Burgess vs. Seligman, 107 U. S., 21, 34.

Chicott County vs. Sherwood, 148 U. S., 534.

McClellan vs. Corland, 217 U. S., 269-282.

D. L. S. Co. vs. A. Club of America, 225 U. S., 489 text 500.

The Federal Court is bound to proceed to final judgment on the merits in all cases within its jurisdiction, and "the pending of a suit in a State Court is no bar to proceedings concerning the same matter in a Federal Court having jurisdiction thereof."

217 U. S., 282.

148 U. S., 534.

B. & M. R. R. Co. vs. Giken, 210 U. S., 155 text 162.

It follows that the appellants are entitled to any decree upon the merits of their bill, which does not directly enjoin proceedings in the State Court.

The English language is rich with words of a decree effective to remove the cloud upon the plaintiffs' title without enjoining proceedings upon appellees' supplemental bill to revive Burr's bill. Not one of the ultimate questions tendered by appellants' bill in the District Court has been "foreclosed" by any decree of a State Court.

In Burgess vs. Seligman, 107 U. S., 34, this court said: "It would be a dereliction of their duty not to exercise an

independent judgment in cases not foreclosed by previous adjudication."

Counsel appologizes for the length of this brief, made necessary by the numerous contentions of appellees, or leaving them unanswered.

Respectfully submitted,

H. BISBEE,
GEO. C. BEDELL,
For Appellants.

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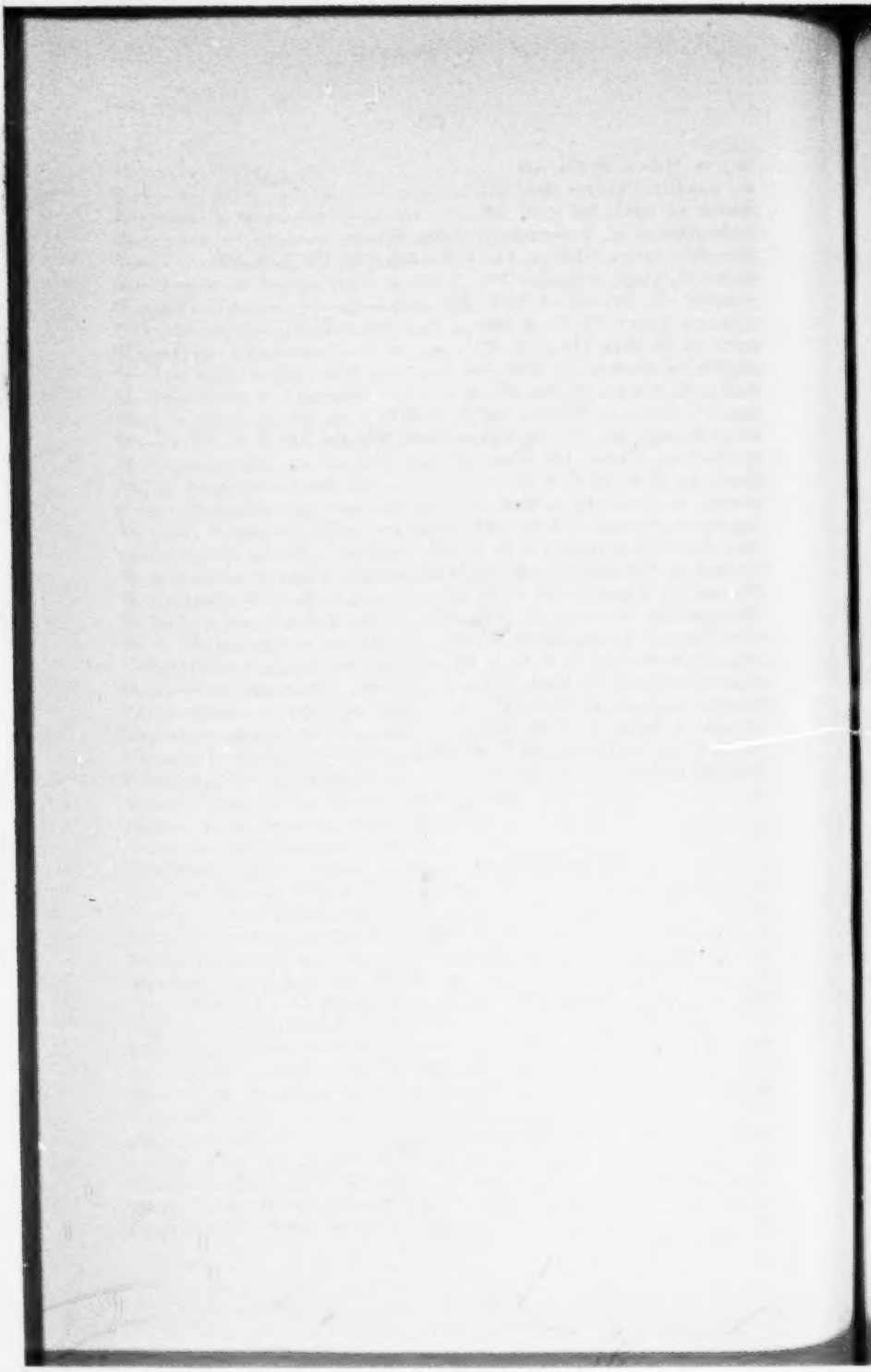

In the Supreme Court of the United States

JOSEPH HULL, et al.,
Appellants,
vs.
ARTHUR E. BURR, et al., as Trustees, Etc.,
Appellees.

No. 767

BRIEF FOR APPELLANTS.

On pages 1 to 3 of Appellants' Brief on Motion to Dismiss is a statement of facts on which appellants rely for relief. On pages 3 and 4 is a statement of the claim of appellees and how it arises. On pages 4 and 5 is a statement of facts showing the claim of the defendants is *unfounded in fact and law.* The Court is referred to those pages of the brief for a statement of the facts and to pages 5 to 9 of the record for a more detailed statement of facts, instead of repeating them here.

Case Below Disposed of on Demurrer.

Appellees, defendants here, demurred to the Bill on sixteen specified grounds. (Rec. 2 to 4). This demurrer was sustained by the District Court that rendered a decree dismissing the Bill with costs, without any qualification that it should be without prejudice.

The Court of Appeals by its decree affirmed the decree of the District Court with costs.

Merits Not Denied.

Neither the trial or appellate court denied that the Bill states a perfect cause for a decree quieting title of

the plaintiffs. On the contrary they both conceded that a perfect cause of action was stated in the bill, even were defendants possessed of the character of trustees, but dismissed the bill on the ground that appellants, called the plaintiffs, can obtain full relief by setting up the facts contained in the present bill in an answer to a suit pending in the State Court of Florida.

The appellate court further ruled in effect that section 720 of the Revised Statutes and the rule of judicial comity prohibited the granting of any relief in a Federal Court, on the ground that granting such relief would enjoin proceedings pending in the State Court of Florida. See opinion of the District Court, pages 27, especially marginal page 40. See opinion of Appellate Court pages 37 and 38 by Judge Putnam. See his opinion on petition for a rehearing, pages 42, 43.

This appeal is prosecuted to reverse those decrees.

Argument on Assignments of Error.

There is but one assignment of error upon the judgment of the Court of Appeals. That is for affirming the decree of the District Court. But this assignment is followed by nine specifications of errors, Nos. 2 to 10 inclusive. Rec. 46-48.

The second specification is on the ground that the Appellate Court erred in holding that the Federal Court was prohibited by Section 720 R. S. *from granting the decree specially prayed.* Rec. 46. This special prayer was for a decree embracing an injunction clause *enjoining the defendants as trustees "from asserting in any Court or place any right, title or interest"* in any of the said properties. See page 17, quoted in opinion of Judge Putnam, page 38.

The third specification of error is that "said Court of Appeals erred in ignoring the prayer in the bill for general relief under which a final and effective decree for complainants can be rendered, without directly or indirectly enjoining the defendants from prosecuting in the

State Court of Florida any suit *pending therein when the present suit was brought''* to which defendants were parties.

The fourth specification is that said Court of Appeals in its opinion states as follows, to-wit: "So far as the litigation is concerned, the questions in the Florida Court *are or may be exactly the same as we have here.''*

The above second, third and fourth specifications can be conveniently argued and considered together.

SECOND, THIRD AND FOURTH SPECIFICATIONS.

It is manifest from Judge Putnam's opinion that he assumed there was a suit pending in a Florida Court *between the same parties,* (they being reversed) to this bill, and that a decree quieting title, containing the injunction clause specially prayed, would violate Section 720 R. S. and the rule of judicial comity which he states in his opinion on rehearing, page 42.

If the above assumption of the learned Judge is not supported *by the record,* his conclusion is erroneous.

No Such Suit as Assumed by the Court Was Pending in the State Court Between the Same Parties When the Present Suit Was Brought.

The demurrer admitted the averments in the bill in respect to the pendency of a suit in the State Court. The eleventh and twelfth sections of the bill, Rec. pages 8 and 9, clearly state what suit was pending in the State Court. Upon those averments, Burr as sole trustee, brought a bill in equity on March 26, 1908 against the present appellants in the State Court of Florida to establish an alleged interest in the properties in question; Burr resigned as trustee under his appointment December 27, 1905 and his resignation was accepted on *March 12, 1909, and subsequently* Burr, Simpson and Edwards, claiming to have been appointed trustees as successors to Burr after his resignation, did on the 9th day of January 1912, (nearly

three years after their alleged appointment) *file a supplemental bill in said State Court to revive Burr's bill that abated,* (in the equity sense of the term) on his resignation.

This present bill, page 9, avers that Burr's bill had not been *prosecuted to issues of fact* before he resigned, and that issues of fact have been joined by answer and replication to said supplemental bill, and "that said issues have not been tried" and there has been "no decree making defendants (plaintiffs there) as trustees complainants" to Burr's bill.

Now upon these facts admitted by demurrer, Burr's bill *had abated* in the equity sense and in Hull vs. Burr, 62 Fla. 499, 502, 503, 504 the Florida Court held that Burr's bill had so far abated that *"no further proceedings"* could be had on it until Burr's successors had been made parties. After that decision the appellees here filed said supplemental bill, and the question of abatement in a State Court is one of local law. Martin vs. B. & O. R. R. Co., 151 U. S. 673.

Certainly it is true in law that the decree specially prayed for containing the injunction clause would not have enjoined the defendants here from prosecuting *Burr's bill* in the State Court, for they were not parties to Burr's bill and the State Court had held that Burr's bill *could not be further prosecuted* until new parties plaintiff had been made to it. And appellants' bill in the court below not only avers that no new parties had been made to Burr's bill, but *that it still stood abated,* when the present bill was filed. See Rec. page 9.

Judge Putnam states that the *"questions in the Florida Court are or may be exactly the same as we have here."* Rec. p. 38. The Court was bound by the averments of the present bill that Burr's bill was not at issue therefore no issue or question of fact involving the 440 acres of land *had been raised at all in the State Court.*

The words *"or may be exactly the same as we have here"* in the Judge's opinion, are *obviously based on the assumption that* Burr's bill *may be revived in the State*

Court, and if it is then the appellants here by answer to Burr's bill can set up the same state of facts that are stated in the present bill, and have them litigated *in the State Court.* Indeed, Judge Dodge expressly says: "the plaintiffs therefore have only to prove in the suit pending in Florida that their interests are as they alleged exclusive of any other, so that the bankrupt could have had no interest in the properties, *and they have finally disposed of the trustees' claim.*"

The Argument.

The argument of both courts below, as shown by their opinions is that as Burr's bill *may be revived; and if it is, appellants can then by an answer thereto have the same questions litigated in the State Court that they seek to have litigated by their present bill* in the Federal Court.

It must be conceded that appellants could not answer Burr's bill and put it at issue until it is revived, because until then there is no plaintiff therein to answer. And as shown the Florida Court has decided no answer can be filed until the suit is revived.

At best the argument of the courts below is that inasmuch as appellants may have in the event Burr's bill is revived, an opportunity to have litigated in the State Court the same questions they pray to have litigated in the Federal Court below, they must be precluded from resorting to the Federal Court at all. Whereas the principal is well settled that the pendency of a suit in the State Court is no bar to a suit in the Federal Court even between the same parties, *as to any questions of fact or law that have not been foreclosed in the suit in the State Court by final adjudication.* And the litigant has a constitutional right to resort to a Federal Court otherwise having jurisdiction.

Burgess vs. Seligman, 107 U. S. 21, text 34.
Chicott Co. vs. Sherwood, 148 U. S. 529.
McClellan vs. Carland, 217 U. S. 269-282.

D. L. Sons vs. A. Club of America, 225 U. S. 489. text 500.
B. & M. R. R. Co. vs. Gokey, 210 U. S. 155, text 162.

Errors of Court Below.

The Appellate Court said that the questions raised in the present bill "may be raised in the State court." We suppose that suggestion is based on the assumption that Burr's bill may be revived and if it is then the appellants can by an answer thereto raise all the questions raised by their present bill, and then the State court will have jurisdiction thereof. That is an erroneous view. There must be a suit pending in the State court between the same parties raising the same questions and for like relief *when* the Federal suit is filed, or Section 720 does not apply. This is self evident.

Watson vs. Jones, 13 Wall. 717-718.
Pendleton vs. Russell, 144 U. S. 645 to 647.
Moran vs. Sturgis, 154 U. S. 279.
Buck vs. Colbath, 3 Wall., 335, Syl. No. 9, text 345.
Hunt vs. N. Y. Cotton Exchange, 205 U. S. 323-339.

Upon the averments in Section 12 of the bill it is shown that the only suit that was pending in the State Court was the suit to revive Burr's bill and the only possible issue of fact in that suit is whether appellees possess the character of trustees.

It is impossible for appellants in answer to the suit to revive to raise the questions raised in the present bill.

But Burr's suit may never be revived; that will depend upon the judgment of this court on writ of error to the State Court should the latter decree a revivor.

It is very clear that a Federal Court cannot abdicate and decline to exercise its jurisdiction of a case before it simply on the ground that the same question may be raised in future in a State Court between the same parties.

A litigant cannot be turned out of the Federal Court on any such ground as that.

Appellants at least were entitled to proceed in the court below until it could be shown that Burr's bill had been revived. It will be time enough to consider the effect of a decree reviving Burr's bill when it is obtained, and the court below should have considered that if the facts stated in the present bill are true such a decree of revivor never can be obtained.

In Fisk vs. U. P. R. R. Co., 10 Blatchford, 518, the court held that Section 720 did not apply to suits not pending in the State Court when the Federal suit was begun.

In Live Stock Association vs. Crescent City, etc., Vol. 1 Abbott's U. S. Repts., 388, text 406, Justice Bradley discussed Section 720 and granted a decree under the prayer for general relief which contained an injunction "restraining defendants from commencing or prosecuting any other suit * * * than such as are now pending against the said plaintiffs." Id., 406-407.

In Watson vs. Jones, 13 Wall., 679, text 715-716, the court said in order to defeat a second suit: "The identity of the parties to the case made and of the relief sought should be such that if the first suit had been decided it could be pleaded in bar as a former adjudication." "* * This relief must be founded on the same facts." Id. 715.

Under the prayer for general relief in that case p. 720, the court decreed substantial relief. See decree p. 699, affirmed p. 735.

It is also true that if appellees should fail to revive Burr's abated suit, they can bring a new suit unless it should be adjudged that they are not trustees, but the fact that they may bring such new suit does not make Section 720 applicable. A decree of revivor would in respect to time put appellees in court as parties to Burr's suit, the same as if they had brought a new suit as of the date of such decree of revivor and Section 720 does not apply.

Section 720 does not apply so as to prohibit the Federal Court in order to protect plaintiff's rights under

Federal judgment, from enjoining proceedings in the State Court, commenced long subsequent to said judgment.

Riverdale Cotton Mills vs. Ala. & Ga. Mfg. Company, 198 U. S., 196-197, Shields vs. Thomas, 18 How. 262-263.
French Trustees vs. Hay, 22 Wall. 250, 257.

THE FEDERAL JUDGMENT IN EJECTMENT AND ITS EFFECT.

In the case of Shields vs. Thomas, 18 Howard, 253, text 262, it was expressly ruled that a bill in chancery is an appropriate mode of obtaining the benefit of a decree or judgment of another court. On page 262 this Court said "Amongst the original and undoubted powers of a court of equity is that of entertaining a bill filed for enforcing and carrying into effect a decree of the same, *or of a different court as the exigencies of the case or the interests of the parties may require.* Story's Eq. Pl., 429, 430, 431 upon the authority of Milford's Eq. Pl., 95, and of Cooper's Eq. Pl., 98-99." And the same is ruled in French Trustees vs. Hay, 22 Wall. 250, 251, and in Riverdale Cotton Mills vs. Ala. & Ga. Mfg. Co., 198, U. S. 188, text 196, where it was expressly ruled that a Federal Court could "restrain the action in the State Court in order to protect the title it had conveyed by the foreclosure proceedings, citing Julian vs. Central Trust Co., 193 U. S. 93-112." And further said, p. 196 of 198 U. S. supra: "In such cases where the Federal Court *acts in aid of its own jurisdiction and to render its decree effectual* it may notwithstanding Section 720 Rev. Stats. restrain all proceedings in a State Court which would have the effect of defeating or impairing its jurisdiction."

And by a parity of reasoning the Federal Court in Massachusetts in aid of giving due force and effect to the said Federal judgment in Florida under which plaintiffs claim protection from attack on their title, can enjoin the defendants as trustees from setting up any title as against the said judgment.

This judgment of the Federal Court is of vital value to appellants, and the defendants' assertions of rights in the 440 acres of land thereby adjudicated to be the property of Hull are in contempt and disregard of that judgment.

One of the objects of the present bill is *to secure to the appellant the Prairie Pebble Phosphate Company the benefit of that Federal judgment in ejectment*, recovered on March 13, 1906 against the Port Tampa Phosphate Company under which defendants as trustees claim. That judgment adjudged that Hull, the said Pebble Company's grantor, was the owner of the fee simple title to the 440 acres of land, and was entitled to the possession thereof. See that judgment, Rec. 26. As the defendants, appellees here, are citizens of Massachusetts personal service of process could not have been made on them on a bill filed in the Federal Court in Florida, and in such cases personal service is indispensable, and appellants were compelled to resort to the court below as the only Federal Court that could obtain jurisdiction over the persons of the appellees, and by its decree give effect to that judgment.

Beyond doubt this court must give to the Federal judgment in ejectment the same force and effect it would have had had it been rendered in a Florida Court.

Hancock Natl. Bank vs. Farnum, 176 U. S. 640, test 645.

And it cannot be doubted that fictitious parties in Florida have been abolished and that *one judgment in ejectment* against the defendant concludes him and all persons claiming under him subsequent to suit brought in which the judgment was rendered. See Gen. Stats. of Fla., Sections 1966 to 1970 inclusive.

This Court has repeatedly ruled that where the common law fictitious parties have been abolished one judgment concludes the parties and all persons claiming under them.

Sturdy vs. Jackaway, 4 Wall. 174, text 176.
Barrows vs. Kindred 4, Wall 399.

No provision is made in the Florida Statute for a second trial.

The facts alleged in the first ten sections of the bill show a perfect and absolute title in the appellant the Pebble Company, fortified by the judgment in ejectment and the resolution of the Port Tampa Company, the alleged bankrupt, under which it sold all its asserted interest to Hull, the Pebble Company's grantor. *These facts being admitted by the demurrer* it follows that it was legally impossible that on the 8th day of November A. D. 1905, when the petition in bankruptcy was filed, that the said Port Tampa Company could have owned any interest in said properties which it could have transferred, or which could have been levied upon and sold under judicial process against the bankrupt under section 70a of the Act of 1898. See Thomas vs. Taggart, 209 U. S. 385, text 389; Hewit vs. B. M. Works, 194 U. S. 296; Low vs. Welch, 139 Mass. 33.

Not Before the Court.

We repeat that upon the averments in the bill admitted by demurrer, the question whether the Port Tampa Company could have possibly still owned some interest in these properties and was not concluded by the said judgment and resolution *is not now before this court.* That question can only arise by an answer assailing the said judgment as not conclusive, and assailing the resolution of the Port Tampa Company and showing it is invalid.

Ignoring Facts Admitted by Demurrer. Caution.

We direct attention to the fact that in opposing counsel's brief in support of their motion to dismiss or affirm, they *in important particulars utterly ignore* that the facts stated in the bill are admitted by demurrer, and base their arguments on facts they assume contradicted by the record of this cause.

Opinion on Rehearing.

In the petition for rehearing, Rec. 39 to 41, second paragraph it was suggested that under *the prayer for general relief* the District Court could have rendered an effective decree quieting the appellants' title and removing the cloud without any injunction clause therein specially prayed for. Strange to say the Court of Appeals did not deny that proposition but dismissed it on the ground that counsel in the courts below *had not specially asked for such a decree.* See Opinion p. 48.

We think it indisputable that it is the duty of a court of equity to overrule a demurrer to a bill, if upon the case made by it the court can award any substantial relief under the prayer for general relief, even though in argument counsel have insisted on the special relief prayed.

Necessarily, counsel in argument of the demurrer was not undertaking to settle the form of a decree on the merits; he was contending the demurrer should be overruled. The settlement of the form of a decree comes later on.

If authority is needed we have abundantly shown by cases cited supra that the court erred in holding no relief could be granted under the general prayer, because it was not asked for in argument. It is even the duty of the wise chancellor to protect the client against remediable mistakes of his solicitor.

Trustees Not Parties to the Federal Judgment.

It may be contended that the Federal judgment in ejectment against the Port Tampa Company, the alleged bankrupt, does not conclude the defendants as trustees because neither they or Burr as sole trustee under his appointment December 27, 1905, *were parties* to the said judgment.

Let us here fix the important dates: The Petition in Bankruptcy was filed *November 8, 1905;* the asserted adjudication was on *November 27, 1905.* Burr's alleged

appointment as sole trustee was on *December 27, 1905. He resigned March 12, 1909.*

The alleged appointment of these defendants as three trustees was subsequent to Burr's resignation as sole trustee and must have been subsequent to Burr's resignation as sole trustee.

The action of ejectment was begun *November 28, 1905,* (one day after the alleged adjudication), process of summons was served December 6, 1905, the return day of the summons was on the *first Monday of January A. D. 1906,* and the verdict and judgment in said action was on *March 13, 1906, seventy-five days after Burr's first appointment.*

When Burr resigned he was as dead in law as if physically dead and he has no rights save under his alleged second appointment subsequent to March 12, 1909.

Taylor vs. Savage, 1 How. 286.

Parkhill's Admr. vs. Bank, 1 Fla. 116-127-128.

Judgment Bound Both Port Tampa Company and Defendants as Trustees.

There can be no dispute that one who claims under and in privity with another who is estopped, is himself estopped. And there can be no dispute that defendants, as trustees in bankruptcy, claim under and in privity with the Port Tampa Company the alleged bankrupt.

And there can be no dispute that in actions of ejectment, fictitious parties were long ago abolished in Florida, and that in such cases a single judgment in ejectment concludes the defendant and all persons claiming by, through or under him.

Moreover the question whether this Federal judgment is a bar though the appellees were not parties to it depends on the construction and application of the provisions of the Bankrupt Act. It is not wholly dependent upon common law principles.

It has been repeatedly decided that where a suit is brought against a person either before or after he has been adjudged a bankrupt, if *brought before the trustee is appointed and qualified,* a judgment in such suit for or

against the bankrupt concludes the trustee whether he was a party to it or not; and this by force of the provision of the Bankrupt Act itself.

In such a case the trustee acquires all the title he has pendente lite and is bound by the judgment the same as a purchaser pendente lite. Even more so, because he is not a purchaser for value. In such case the alleged title of the trustee "falls" on him and accrues at the time he qualifies and consequently pendente lite.

Eyster vs. Gaff, 91 U. S. 524.
Johnson vs. Collier, 222 U. S. 538, text 540.
Knapp vs. M. Trust Company, 216 U. S. 545-557.

In the following cases the judgments were held to bind the trustee though rendered in suits brought after the adjudication in bankruptcy.

Burbank vs. Bigelow, 92 U. S. 179, text 181-182.
Holland vs. Morton, 123 Mass. 278.
Brecht vs. Dayton, 34 Minn. 214, s. c. 25 N. W., 348.
Johnson vs. Collier, 222 U. S. 538.

Hampton vs. Rouse, 22 Wall. 263, text 275; Sedwick Assignee vs. Grinnell, 9 Benedict's Rep. 430 by Justice Blatchford are unanswerably reasoned to the same effect.

The action in ejectment in the Federal Court having been begun November 28th, and process served December 6th, and Burr as sole trustee *not having been appointed until December 27* (when he was qualified is not *known* but not until after he was appointed), said Federal Court had jurisdiction of the parties and subject matter and was bound to proceed to judgment. Burr as sole trustee having been appointed after the action began acquired no title as trustee until he was qualified. He so acquired *pendente lite* of the action in ejectment and is bound by it. It was impossible for Hull to make him a party defendant to the action when he commenced it, because he had not then been appointed trustee. Being a citizen of Massachusetts it was impossible for Hull to make him a party *after the action was begun*. Hull by delaying action might have been barred by the statute of

limitations, (Johnson vs. Collier, 222 U. S. 538) even though Hull had known of the bankruptcy proceedings.

No Defense.

The Port Tampa Company did not defend the action of ejectment. Doubtless in the light of the title of record in Hull and its own resolution it concluded there was no defense, and it would have been a waste of its assets to have done so. Not having defended nor applied for a postponement of trial, as it could have done, it and the trustee not having applied to become a party, both are concluded and this court has repeatedly so ruled.

Scott vs. Ellery, 142 U. S. 384.

Jaquith vs. Rowley, 188 U. S. 626.

The rule is stated in Thatcher vs. Rockwell, 105 U. S. 469 and authorities cited.

As the judgment was not taken until seventy-five days after Burr was appointed sole trustee, and as the bill alleges *all the assets of the bankrupt were in Florida and that it never did any business* except in Florida, (Rec. pages 9 and 12), it will be presumed that Burr had notice of the said action. It was his duty to have known of it and gross negligence if he did not, which cannot be presumed.

No Attention.

Neither the District Court nor Court of Appeals considered or even mentioned this judgment in ejectment.

On the first branch of the case then it is submitted (a) That the bill states a perfect cause of action for a decree quieting title, etc., even conceding that defendants possess the character of trusees.

(b) That a decree as specially prayed for is not prohibited by Section 720 Rev. Stats. nor by the rule of comity.

(c) That an effective decree ending all litigation can be rendered under the prayer for general relief without violating Section 720 or the rule of comity.

PROPER FORM OF DECREE UNDER PRAYER FOR GENERAL RELIEF.

"It is ordered, adjudged and decreed that legal title and right of possession of the lands and personal properties described in the bill of complaint be and they are hereby established to be vested in the Prairie Pebble Phosphate Company, one of the plaintiffs, as against the defendants claiming as trustees of the estate of the Port Tampa Phosphate Company in bankruptcy; and that defendants claiming as such trustees have no right, title or interest in to or of the said properties or any part thereof."

A like decree was affirmed in Coder vs. Arts, 213 U. S. 228-245.

Such a decree would "not stay any proceedings" pending in the Florida Court within the meaning of Section 720 R. S., when the present suit was brought.

Nor would a decree that defendants are estopped by the Federal judgment from asserting any interest in the 440 acres of land.

Such or a like decree would not enjoin the defendants as plaintiffs in the supplemental bill from prosecuting it to a final decree.

If such a decree was in their favor making them parties to Burr's abated bill, then and not till then a decree of the Federal Court below in the form above suggested could be pleaded in bar of the further prosecution of Burr's bill in the State Court the same as it could be pleaded in bar of any new suit these alleged trustees might bring in the State Court.

And the suit on Burr's bill in which, as adjudicated, no further proceedings can be had until revived *has no vitality as a pending* suit until there is a decree of revivor of it in some forms, and if such a decree should ever be obtained the pendency of Burr's bill as a suit having vitality would be of the date of the revivor so far as Section 720 is concerned.

Certainly Congress never intended by Section 720 to

prohibit the prosecution of a suit in a Federal Court to a final decree, that could be pleaded in bar of another suit pending in a State Court, between the same parties, where such final decree can be rendered in any form that does not enjoin proceedings pending in a State Court in which the State Court acquires jurisdiction of the same questions after the Federal suit is brought.

Fifth, Sixth and Seventh Specifications.

These are as follows, (Rec. 47):

Fifth. Said Court of Appeals erred in ruling in effect that the District Court had not jurisdiction to render a decree depriving the defendants as alleged trustees in bankruptcy of any benefit of the alleged decree adjudging the Port Tampa Phosphate a bankrupt, on the ground that the said alleged decree, under which defendants exclusively claim, was obtained by fraud and perjury perpetrated upon the said District Court as a court of bankruptcy.

Sixth. Said Court of Appeals in its opinion states as follows, to-wit: "The facts in this case are so fully stated in the opinion of the learned District Court that we do not find it necessary to restate them;" and based its judgment upon the facts as stated by the District Court. This was error in this: the material facts of the resolution of the Port Tampa Phosphate Company, set forth in the 9th section of the bill of complaint, whereby said Company sold to complainant Joseph Hull all the interests it ever had in the properties, more than five months before the petition in bankruptcy was filed; and the judgment recovered by said Hull in the ejectment suit against the said Company in the Florida Federal Court, and set forth in the 10th section of the bill of complaint, are not mentioned or referred to in the opinion of the District Court, and the said resolution, and the said judgment conclusively estop and preclude the Company and defendants as trustees claiming under said Company from asserting any interest in the properties involved

in this suit, which said Court of Appeals did not consider or allude to in its opinion.

Seventh. Said Court of Appeals in its opinion declared and ruled as follows, to-wit: "We are also entirely satisfied with his conclusions and his reasoning (of the District Court) so far as the same was necessary to the conclusions reached by him." This ruling of the Court of Appeals was erroneous in this: that it affirms the conclusions and errors of the District Court upon the following points, to-wit:

(A) The District Court held that the bill of complaint showed that it as a court of bankruptcy, had jurisdiction of the subject matter and person of the Port Tampa Phosphate Company to adjudge said Company a bankrupt.

(B) That fraud and perjury of the officers of said Company, three of whom were the petitioning creditors, all of which were admitted by the demurrer, were not available to vitiate and avoid the alleged decree in bankruptcy, and defendants character as such alleged trustees.

(C) That it was immaterial to the plaintiffs whether they were sued in the Florida Court by the defendants as trustees, or by the said alleged bankrupt, whereas, the said resolution of the bankrupt and the said judgment estopped and precluded it from suing the plaintiffs; and the bill avers that its said officers who were the petitioning creditors, and others of its officers, fabricated the proceedings in bankruptcy and every jurisdic-
75 & 76 tional fact, in said proceedings for the sinister purpose and intent of corruptly obtaining said alleged decree in bankruptcy, and an apparent, but not real, trustee, who could sue, vex and annoy the present plaintiffs.

(D) The District Court ruled that if the facts stated in the plaintiffs' bill of complaint are true (they are admitted by the demurrer), they constitute a complete defense to the suit by the present defendants as plaintiffs in the Florida Court, and that such defense in the State Court, defeated jurisdiction of the Federal Court to

grant any relief, whereas, it is apparent from the averments in sections 11th and 12th of the present bill of complaint that there is no suit pending in the Florida Court, in which said facts can be set up as a defense, and the Florida Supreme Court, has expressly so decreed.

These assignments may be discussed together. We first discuss the seventh assignment.

The Latter Part of Sections 12 to 29 of the Bill States a Fraudulent Combination by the officers of the Tampa Company to Create a Trustee, With the Apparent Right to Attack the Plaintiffs' Title, Knowing There Was No Foundation for Bankrupty Proceedings. A Consideration by the Court of That Part of the Bill is Specially Urged.

First: As a part of the fraudulent scheme a pretended act of bankruptcy is alleged as follows, to-wit:

"And your petitioners further represent that said Port Tampa Phosphate Company is insolvent, and that within four months next preceding the date of this petition the said Port Tampa Phosphate Company committed an act of bankruptcy, in that it did heretofore, to-wit, *on or about the ninth day of October, A. D. 1905 suffered and permitted,* while insolvent as aforesaid, certain creditors to obtain a preference through legal proceeding, by process of attachment, and not having at least five days before a sale or final disposition of its property effected by such preference, vacated or discharged such preference." See Petition Rec. p. 19.

It was legally impossible that a creditor on November 8th, (date of filing the petition) could have obtained a preference by legal proceedings *"by process of attachment"* issued as the petition states on October 9th.

Every court having the question before it has ruled that the issuing and levying a writ of attachment upon the property of a debtor is not an act of bankruptcy *and does not state the essential jurisdictional fact of an act of bankruptcy.* So ruled by Judge Putnam in Parmenter

Manufacturing Company, 38 C. C. A. 200; 97 Fed. 330. Also so ruled in an elaborate opinion by *Judge Dodge* in In Re Crofts Riorden Co., 185 Fed. 931. And by Judge Aldrich (of the court below) in In Re Vetterman, 135 Fed. 443. Cases collected in Collier on Bankruptcy treating of clause 3, Section 3 of the Act. Holmes vs. Baker, 88 C. C. A. 104-105.

The Bill, page 12 near top, *alleges that all the property the bankrupt ever owned was located in Florida;* so no attachment could have been levied except in Florida, and by the laws of that State the creditor by attachment acquires no right to appropriate the attached property to pay his debt until final judgment.

General Stats. of Fla., Secs. 2115-2119.
Aldrich vs. Dzialynski, 14 Fla. 187 and text.
Smith vs. Bowden, 23 Fla. 157. Those statutes were in force in 1905.

The jurisdictional fact must *affirmatively appear.*

Galpin vs. Page, 18 Wall 350-351.

In Scott vs. McNeal, 154 U. S. p. 46, this court declared: "No judgment of a court is due process of law if rendered without jurisdiction in the court, or without notice to the party." And further said: "*and such a judgment is wholly void if a fact essential to the jurisdiction of the court did not exist.*" And if such fact is affirmatively alleged but proven false the judgment is void.

Thompson vs. Whitman, 18 Wall. 457.
Scott vs. McNeal, 154 U. S. 46.
Bigelow vs. Old Dominion Copper Co., 225 U. S. 135-136 reviewing Thompson vs. Whitman.

False.

Section 14, Rec. p. 10, avers that the averment of a preference in the petition was false, and the petitioning creditors knew it was false. The demurrer admits it was false.

The following results are inevitable:

(A) The petition did not state the jurisdictional fact of an act of bankruptcy.

(B) The pretended statement of such fact was false and petitioning creditors knew it.

(C) Conclusion of Law.

The pretended preference alleged is a *bald conclusion of law,* without vitality as a pleading, and if otherwise it possessed any vitality *it was destroyed by the words "by process of attachment." The petition names no creditor, nor court, nor State, nor county where the process of attachment issued.*

A conclusion of law states no issuable fact, is not provable and is not *admitted by demurrer.* And as a pleading is a nullity. Gould vs. R. R. Co., 91 U. S. 526-536; Pennie vs. Reis, 132 U. S. 469; Alabama vs. Burr, 115 U. S. 424, text 425-428; Ray vs. Wilson, 29 Fla. 342, 352, 353; Ohm vs. San Francisco, 92 Cal. 437, where held that a conclusion of law "*will be treated as if not alleged.*" 12 Vol. Enc. Pl. & Pr. pp. 1024 et seq.

Averments in the language of the Bankrupt Act in respect to an act of bankruptcy are held not to state a jurisdictional fact in the following cases: In Re Plotke 44 C. C. A. 282; Clark vs. Henne & Meyer, 62 C. C. A. 172-180, specially applicable, reviewing cases. Judge Deady in Re Randall, Deady's Rep. 557; In Re Sig H. Rosenblatt, 113 C. C. A. 506, held by Judge Lacombe that an averment in the language of the Statute does not state an act of bankruptcy.

Wilson vs. Bank, 17 Wall. 481-482,

The bill avers that no judgment was ever obtained against the Company and that the only attachment proceedings were taken at the instance and controlled by the petitioning creditors. Rec. p. 10.

Preference Defined.

This court has frequently ruled that creditor obtains no preference until he has acquired indefeasible power to appropriate the debtor's property to pay his claim *and thereby diminish the estate of the debtor.*

Bank vs. Bank, 225 U. S. 178.
W. T. & T. Co. vs. Brown, 196 U. S. 502-509.
Bank vs. Massey, 192 U. S. 138.
Rector vs. Bank, 200 U. S. 405-419.

Company Never Committed an Act of Bankruptcy.

Sections 15 and 16 of the bill, Rec. p. 11, charge that the Port Tampa Company never committed an act of bankruptcy and that all of the directors of the Company and their attorneys knew it had not.

Another False Jurisdictional Fact.

The petition states that the Port Tampa Company had had for the greater part of six months, etc., its principal place of business in Boston. The bill, page 9 of the record marginal page 12 and page 12, avers that the Company never did any business except in Florida and that all its assets were in Florida, and the petitioning creditors knew it. And the bill specially avers in Section 17, Rec. 11 and 12, that the allegation in respect to the place of business in Boston is untrue, and the "said Company never did any business * * * * except in the State of Florida" and "that whatever properties the said Company owned or pretended to own were in the State of Florida at the time said petition was filed."

Allegation as to Principal Place of Business is Jurisdictional. Section 2 of the Act.

Collier on Bankruptcy treating of that section, pp. 26 to 28, citing cases. Dressel vs. North State Lumber Company, 107 Fed. 255; M. S. S. Co. vs. City of M., 83 Wis. 590, 18 L. R. A., 353; In Re P. A. Co., 165 Fed. 249; In Re H. S. Mfg. Co., 110 Fed. 352; In Re Little 3 Benedict, 25-27, where Judge Blatchford refused to discharge the debtor because the petition was in New York, whereas his place of business was in New Jersey. If the Company

had committed an act of bankruptcy, the Florida Federal Court was the only court having jurisdiction of it.

Principal place of business was in Florida.

Home Powder Company vs. Geis, 123 C. C. A. 95, text 98, (204 Fed. 568), a late case peculiarly applicable.

Jurisdictional Facts Fabricated.

The bill avers that all pretended jurisdictional facts stated in the petition were false, and were fabricated by the Directors of the Company for the purpose of falsely manufacturing an apparent case of jurisdiction and imposing on the Court, and were known to be untrue by said officers and petitioning creditors. See page 11 of Record.

This Court is specially urged to read and consider pages 10, 11, 12, 13, 14, 15 and 16 of the Record.

On those pages the following facts are alleged and are admitted by the demurrer:

First: That Hiram W. Rowell, William F. Wills, Benjamin L. Emerson, Robert Hamilton and Hayes Lougee were the only Directors of the Company, (the directorate consisting of *five members*), *and owned a large majority of the stock of the Company.*

Second: That each of the said Directors was or claimed to be a creditor of the Company.

Third: *That said Rowell, who was also President of the Company, Hamilton and Lougee were the petitioning creditors.*

Fourth: That in the bankruptcy suit there was no adverse element, the Directors were *domini litis* of both sides of the case.

Fifth: Being domini litis of both sides of the case, and owning a majority of the stock, the Company was powerless in its corporate capacity to appear to and defend the petition, though it appears from the allegations in Section 20 of the bill, page 12 of the record, that *from the standpoint of these Directors* the Company was not

insolvent and that it had a perfect defense to the petition.

Sixth: That these Directors owning a majority of the stock, by their combination did not intend that the Company should make any defense and rendered it physically and legally impossible for the Company to make any defense. See Sections 23 and 24 of bill, Rec. p. 13.

Seventh: That these Directors concealed from the Court the fact they were Directors, and one its President, and made it appear to the Court that the petition was an involuntary petition whereas it was in law and legal effect a voluntary petition by the Company prohibited by the statute. See Section 24.

Eighth: That by such combination of the Directors and frauds on the Court committed by them, the alleged decree in bankruptcy was obtained by fraud and fabrication of facts and imposition on the District Court.

Points of Law Applicable.

First: Where it appears that the plaintiffs in a suit dominated the defendants, the proceedings are mere "*paper forms*" *and a nullity.* Lord vs. Veazie, 8 How. 251-256; Haley vs. Bank, 12 L. R. A. 815-817-818, where a collusive suit between a corporation and its secretary was dismissed. South Springs * * * Mining Co. vs. Amador * * Gold Min. Co., 145 U. S. 300; 12th Vol. Enc. Pl. & Pr., pp. 166 to 168, where the authorities are collected. In Re Burdick, 162 Ill. 48.

Second: The President and Directors of a corporation cannot lawfully be petitioning creditors by reason of their relationship to the debtor.

Sec. 59e of Act of 1898. Brandenburg on Bank-Bankruptcy, Secs. 933-934.

In Re Independent Thread Co., 113 Fed.

In Re Bates Mch. Co., 91 Fed. text 629 by Judge Lowell.

Third: Where it appears that a decree has been obtained by fraud, equity will not permit any rights thereby obtained to be asserted against a stranger to the decree.

Marshall vs. Holmes, 141 U. S. 589.
12 Vol. Enc. Pl. & Pr., 202.
City vs. Riley, 140 Mass. 488.
Stafford vs. Weare, 142 Mass. 231.
Vose vs. Morton, 58 Mass. 27 by Ch. J. Shaw.
2d Vol. Pom. Eq., Section 919 declares:

"When a judgment or decree of any court, whether inferior or superior has been obtained by fraud the fraud is regarded as perpetrated upon the court as well as upon the injured party. The judgment is a mere nullity, *and it may be attacked and defeated* on account of fraud in any collateral proceedings brought upon it." Consequently, the decree can be *directly attacked* as by the present bill it is.

The English language is incapable of stating a more flagrant case of fraud and imposition upon the court than is stated in the present bill.

Fourth: The frauds were perpetrated with intent and design of injuring the plaintiff Hull through whom the Pebble Company claims *and it is so alleged in the bill,* page 9, marginal page 12. Therefore, the following principle declared by Freeman on Judgments, 2 Vol., Sec. 336, applies:

"Whenever a judgment or decree is procured through fraud of either of the parties, or by collusion of both, for the purpose of defrauding some third person, he may escape from the *injury thus attempted by* showing even in a collateral proceeding the fraud or collusion by which the judgment or decree was obtained." Citing many cases.

Directors No Power to Admit Insolvency and Willingness to Be Adjudged Bankrupt.

Even the Directors of a corporation existing under the laws of Massachusetts have no authority to admit its inability to pay its debts and its willingness to be adjudged a bankrupt. That right depends upon the laws of the State.

Home Powder Company vs. Geis, 123 C. C. A. 94, text 96, citing In Re Bates Machine Company, 91 U. S. 625.

In Re Quartz Mining Company, 157 Fed. 243 affirmed under the title of Van Emon et al. vs. Veal, 85 C. C. A. 547, 158 Fed. 1022.

Sixth Assignment or Specification. Rec. 47.

Fifth: The error insisted upon in this specification has been discussed under specifications Nos. 2, 3 and 4.

Revivor of Suit.

The ninth specification has also been already partially discussed. We add that upon the facts in this bill, Burr's bill can never be revived and that there is no law or rule of court under which the State Court can decree a revival of Burr's bill. Under the head of "Revivability" this question is discussed in appellants' brief on the motion to dismiss, pp. 35 to 36, to which the Court is referred.

The Eighth Specification of Error. (Rec. 48).

This claims error in the Court of Appeals in not modifying the decree of the District Court so as to read "without prejudice" and so it could not be pleaded as res adjudicata.

The District Court, as shown by its opinion, ruled that the court of bankruptcy had jurisdiction of both the cause of action and of the person, and that appellants could not attack its jurisdiction nor show it was obtained by fraud, but finally remits the appellants to the Florida Court to obtain by an answer the remedy sought by this bill. Out of abundant caution the decree dismissing the bill, (if otherwise correct) should read "*without prejudice*" to prevent any contention that any point decided is res adjudicata.

Durant vs. Essex Company, 7 Wall. 107, text 109.

In the petition for a rehearing, Rec. p. 41, the Court of Appeals was asked to so modify the decree of the District Court. And that court in its opinion on the petition for a rehearing said as to that: *"We only remark that we see no occasion therefor,"* etc. But the State Court may not take the same view as to the effect of the decree.

Sixth: Section 21e of the Bankrupt Act of 1898.

The contention that said section precludes judicial inquiry into the validity of the bankruptcy proceedings is answered in Appelants' Brief on the Motion to Dismiss, pp. 26 to 28 inclusive to which the Court is referred, and the Court will please consider those pages repeated here.

Seventh: No Jurisdiction of the Person of the Port Tampa Phosphate Company.

The bill makes an attack upon the jurisdiction of the Court of Bankruptcy over *the person of that Company.*

Exhibit "B," Rec. p. 20, shows that the subpoena on the petition was not signed by or in the name of any clerk of the court but by "Mary E. Prendergast, Deputy Clerk." And the same Exhibit shows that service of this subpoena was not made by or in the name of any marshal of the court but by "J. H. Waters, Deputy U. S. Marshal," and the services was made on "Emerson, Clerk of said Corporation" and not on any officer who impersonated the Company.

Exhibit "C," Rec. p. 29, shows that the only appearance was in the following words: "In the above cause I appear for the Port Tampa Phosphate Co. (Sign) J. H. Robinson," not showing that he was a member of the bar of the court, *or that he was even an attorney at law.*

This appearance by J. H. Robinson was the result of of *"artifice and stratagem"* on the part of the petitioning creditors and officers constituting a majority of the Direc-

tors, so as to make it falsely appear on record to the court that the Company had appeared to the petition against it.

They were doubtless conscious that the subpoena by a person calling herself a deputy was void, that the service by the person calling himself a deputy on a *clerk of the corporation* was void, and to cure such defects got this J. H. Robinson to file said appearance.

Allegations in the Bill in Respect to Appearance.

On page 12, Sec. 18, it is alleged that the subpoena and return thereon and each of them "*was illegal, unauthorized and void, and that the J. H. Robinson was never in fact authorized by the said Company to enter for it the said appearance.*"

And on page 10, Sec. 14, it is averred that "*said Company did not on or prior to November 27, 1905, or at any other time voluntarily submit itself in the said proceedings to the jurisdiction of the said court.*"

The Controversy Immaterial.

But any point about the jurisdiction of the person is not important. Upon the facts in the bill to which the attention of the Court has been directed, it is obvious that the officers of the Company who were also creditors *did not intend that the Company, in its corporate capacity, should defend the petition* and had so combined and contrived that said Company could not possibly defend. The Company was throttled. What they had done and were intending to do under color of being creditors, they did not as Directors intend to undo and defeat themselves in their scheme to obtain an adjudication, by permitting the Company to defend. The Company could no more defend the petition than could a natural person, who after service of subpoena in bankruptcy, had been *kidnapped by banditti* and concealed in a cave or iron vault and kept there until proceedings in bankruptcy had been wound up.

It was a part of the fraudulent scheme to obtain an *adjudication on paper.*

Point of Law.

But we think it well settled that in the absence of any statute changing the common law, (and there is none in this case) the act of a deputy, *when the law requires it to be done* by his principal, or when done by a person calling himself a deputy without disclosing his principal is a nullity.

1st Vol. Greenl. Ev., Sec. 506.
Morris vs. Patchin, 24 N. Y. 394.
Sampson vs. Overton, 4 Bibb. 409.
Garneau vs. Dozier, 100 U. S. 7.
Gibbens vs. Pickett, 31 Fla. 147;

where on page 15 the authorities are collected, and where held service by a deputy sheriff of a subpoena in chancery not disclosing his principal was a nullity.

Return Void.

The return of service by "J. H. Waters, Deputy Marshal" does not show that the subpoena ever went into the hands of the marshal of the District Court of the United States for the District of Massachusetts, *nor of what court he was a deputy marshal. For that reason alone the service was void. 31 Fla.,* 151 at bottom.

Section 558 of the Rev. Stats. of the United States requires a deputy clerk to act *in the name of the clerk.*

Judicial Notice.

One court cannot take judicial notice that any particular person is a deputy clerk or marshal of another court, but can take judicial notice who the principal is.

Appointment of Defendants as Trustees Void Even Though the Decree of Adjudication Was Valid.

The 26th Section of the bill, Rec. 14, states facts establishing that the appointment of defendants as trustees was void even though the decree was valid.

First: There was no notice of a meeting of creditors given as required by the statute.

Second: *The appointment was made by one creditor only, William F. Wills the Treasurer of the Company, when there were ten other creditors.*

Third: The appointment was made by *Wills alone* before Burr *had resigned and when there was no vacancy in the office of trustee.*

Fractions of a day in such a case are material.

4 Kent's Comm., 8th Edn. top page 98.
Clute vs. Clute, 4 Denio 241-244.
Lemon vs. Staats 1 Cowen 592.
Richardson et al., 2 Story's C. C. Rep. 571, (a bankruptcy case).
Bank vs. Burkhardt, 100 U. S. 689.
8 Vol. Am. & Eng. Enc. of Law, 2d Edn., 742-743 notes.

In Bankruptcy cases the court will inquire as to the precise time of an act even to the divisions of an hour.

Ex parte DeObree, 8 Ves. Jr. 82.
Sadler vs. Leigh, 4 Campb. 197.
Thomas vs. DeSauges, 2 B. & Ald. 586.
Ex parte Duprene, 1 Ves. & B. 51.
Wydown's Case, 14 Ves. Jr. p. 80.

Form No. 55 prescribed by this court requires notice shall recite that "*a vacancy exists in the office of trustee.*"

An appointment to fill a vacancy when no vacancy exists is void.

Griffith vs. Frazier, 8 Cr. p. 1, where so held by Ch. J. Marshall.
People ex rel. Woods, 91 N. Y., 616-633.

Section 26 of the bill shows that there was "*a stratagem and artifice*" to procure an appointment by Wills alone without notice to other creditors. See 91 N. Y. 633, where held the appointment was "*a nullity.*"

Where all persons entitled to vote do not have notice of the meeting, the appointment is void.

People vs. Batchelor, 22 N. Y. 134, text 135.

See 8 Vol. Enc. of Law, 776, Notes 4 and 5.

Judicial Comity.

"Comity however has no application to questions not considered by the prior court."

Mast, Foos & Co. vs. Stover Mfg. Co., 177 U. S., text 489.

"Clearly it applies only to questions which have been *actually decided and which arose under the same facts.*" Id.

"It requires no court to abdicate its individual judgment."

Id. p. 485 in Syllibi.

Some Other Points. Judicial Comity.

There is no brand of judicial comity that will justify a Federal Court of Equity to forebear deciding questions in a cause of which it has jurisdiction simply on the ground that a *State Court may at some future time* be possessed of the same question between the same parties, nor even on the ground that the State Court has already possession of the questions, *provided* it has not taken the property involved into its custody.

Parties.

In cases like this at bar the alleged trustees are the only necessary parties.

Kerrison Assignee vs. Stewart, 93 U. S. 155, text 158-160.

Vetterlein vs. Bowes, 124 U. S. 169, text 172.

Story's Eq. Pl. Secs. 141-149-150.

Some Points on Judge Dodge's Opinion.

First: From his opinion it seems he examined the record of the bankruptcy proceedings and drew conclusions therefrom, Rec. p. 27. This he had no right to do. He was bound by the facts in the bill admitted by demurrer.

Storm vs. U. S., 94 U. S. 76.
Hecht vs. Boughton, 105 U. S. 235.
South Carolina vs. Wesley, 155 U. S. 542-544.

Second: He suggests that the act of bankruptcy might have been more specific *by amendment or dismissed* if the "objection had been raised at the time." Rec. 28 at bottom.

But the present bill shows:

(a) It could not have been truly amended so as to state a case within the jurisdiction of the court.

(b) The Company's mouth was closed and it *could not raise the objection.*

(c) Appellants are strangers and could not have been heard.

Third: He suggests that any want of a valid appearance was cured *by filing schedules subsequent to date of adjudication.*

But a void judgment or decree is always void.

Even an amendment supplying jurisdictional facts does not cure its voidness, but will lay a foundation for a subsequent valid decree. Cases cited in Vol. 2 Enc. of Pl. and Pr. So ruled by Judge Sawyer in the bankruptcy case of In. Re Lady B. M. Co., 2 Abbott's C. C. Rep. (9 Cir.) 527-529-530, where the precise point is ruled.

Fourth: He absolutely ignored and repudiated the unbroken line of adjudications that placing an attachment on a debtor's property is not an act of bankruptcy *and creates no preference.* Rec. 28. He disregarded and repudiated his own elaborate decision in In Re Crofts R. Co. 185 Fed. 931; 26 Am. B. Rep. 444; and Parmenter Mfg. Co., 38 C. C. A. (1st Cir.) so holding, which have been followed by other courts.

Fifth: He disregarded the allegation in the bill that the Company never authorized J. H. Robinson to appear for it. Rec. 20 at bottom.

Resort to the Federal Court Fully Justified by the Facts.

First: Because appellants had the constitutional right to invoke the jurisdiction of the Federal Court on the ground of diverse citizenship, and on the ground of Federal questions involved.

Second: Because there had been in the Florida State Court no decision of any of the questions of fact or law presented by appellants' bill that could be pleaded in bar of their bill.

Third: Because it did not,—and it is absurd to suppose—(a) That Burr's bill set forth that appellants had a perfect legal title of record; (b) or that such title was fortified by the Federal judgment in ejectment; (c) or the resolution of the Port Tampa Phosphate Company by which it sold to Hull all its equitable rights in these properties. Therefore the same questions of fact and law were not tendered in Burr's bill that are tendered by appellants' bill.

Fourth: Because the fact that Burr's bill may on the supplemental bill be revived *at some future time,* thus giving appellants a chance to set up by answer in defense thereto the same facts averred in this present bill in the Federal Court, on which they pray *affirmative relief,* is no reason why appellants should have waited to see whether that event will happen, and forbear until it does happen, invoking the jurisdiction of the Federal Court by an original bill wherein they are plaintiffs against these defendants.

Fifth: Because in the event a decision of the questions presented by appellants' bill in a suit in the State Court should be rendered, it would be reviewable on writ of error to said State Court by this Court as the court of last resort, and an end of the litigation on appellants' original bill can be obtained much quicker and at less

expense that it can through the Supreme Court of Florida.

Sixth: Because the only question pending and before the State Court when appellants' bill was filed (Aug. 8, 1912), is whether or not the present defendants possess the character of trustees, and that question is tendered and the only one tendered by their supplemental bill to revive and was not decided when appellants filed their bill, *and has not yet been decided.* And the fact that such question is pending in the State Court is not a bar to appellants' bill in the Federal Court below, though said bill raised the *same question as the second ground for relief,* to-wit: that defendants are not trustees, *but in no way connected with the grounds of relief stated in the first nine sections of appellants' bill.*

Seventh: *What the State Court Had Decided on Interlocutory Appeals. A Further Reason.*

On appeal from an interlocutory order overruling pleas of appellants, defendants to Burr's bill, before he resigned, the Supreme Court of Florida decided that a trustee in bankruptcy was not bound by a judgment in ejectment against the alleged bankrupt, (the Port Tampa Company) *because he was not a party to it, even though he was not appointed trustee until after the suit was brought in which the judgment was rendered.* And on the said appeal said State Court further decided that a decree adjudging the Port Tampa Company a bankrupt by the U. S. District Court in Massachusetts *ipso facto* and by operation of law placed any property said Company owned located in the State of Florida *in custodia legis* of the said District Court. See Hull vs. Burr, 61 Fla. 625, Syl. No. 4, text 628-629. And the said State Court on appeal from an order sustaining exceptions to part of the answer of appellants to the said supplemental bill to revive, the Supreme Court of Florida affirming said order rendered an opinion which the present defendants Burr, Simpson and Edwards and their counsel insist *decided that neither in defense of the said supple-*

mental bill nor in defense of Burr's bill (if revived) *can these appellants make any collateral attack upon the validity of the bankruptcy proceedings, and no matter how void they are, it cannot be shown in defense of either of the said bills in the State Court.* See Hull vs. Burr, 64 Fla., 84, text 87 (last part) and 88.

Not one of the cases cited by the Florida Court on the said page 88 supports any such crude proposition.

After such judicial tergiversations, refusing to be bound on Federal questions by the repeated judgments of this Court, a resort to the Federal Court was not too soon.

We submit the demurrer should be overruled, the defendants required to answer the bill, and all questions should be decided that are presented by the demurrer to control the court below in the future progress of the cause.

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For Appellants.

In the Supreme Court of the United States

JOSEPH HULL, et al.,
Appellants,

vs.

ARTHUR E. BURR, et al.,
Appellees.

No. 767

BRIEF OF THE ARGUMENT AND REPLY TO APPELLEES' BRIEF.

The controlling considerations in this cause are as follows and they are in nowise met or mitigated by anything offered in Appellees' brief.

The facts stated in this bill and admitted by the demurrer presented a plain case for equitable relief quieting title.

a. The bill deraigned plaintiffs' title to the common source.

b. It deraigned defendants' claim to a common source.

c. It showed defendants' claim to be invalid.

(1) Because of the written assurance contained in the Resolution of the Port Tampa Company set out in the 9th paragraph of the bill (Rec. p. 7) and the payment of money set out in the bill.

(2) Because the title of Hull had been adjudicated to be valid by the Federal Court in Florida, in the ejectment suit brought by Hull against the Port Tampa Company.

(3) Because the defendants themselves are asserting an authority as officers of the United States District Court for the District of Massachusetts that is illegal and inequitable.

d. The bill also alleged possession in the ~~Trust~~ Company at the time of the filing of the bill. (Rec. p. 6). This is not questioned.

A question is raised in the brief as to who had possession at the time of the adjudication in bankruptcy but that is not really material to a determination of the case for the ~~Trust~~ Company was in possession at the time of the filing of the bill and its title was valid on the averments of the bill.

These facts made a case for equitable interference quieting title.

1 Pomeroy's Eq. Juris. 2d Edn. Sec. 272.

The case was properly brought in the Federal Court independent of diversity of citizenship, (a) because it sought the enforcement of a judgment of a Federal Court, in itself a sufficient ground of Federal jurisdiction, (Crescent Live Stock Co. vs. Butchers, 120 U. S. 146-7) and

(b) Because it could not well be brought elsewhere, assailing as it did the authority of Federal officers.

Gumbel vs. Pitkin, 124 U. S. 131.

Bock vs. Perkins, 135 U. S. 628.

Ex parte O'Neal, 125 Fed. 967.

This court has therefore jurisdiction.

Warner vs. Searle & Hereth Co., 191 U. S. 205.

Henningsen vs. U. S. Fidelity & Guaranty Co., 208 U. S. 404.

The defendants contend that the judgment in ejectment is void because the suit was begun and the judgment rendered in Florida after the adjudication in Massachusetts, but this is an erroneous view because during the interim between the adjudication and the qualification of a trustee the bankrupt holds as trustee and may sue and

be sued with respect to the estate, and the trustee when qualified takes pendente lite on the principles laid down in Eyster vs. Gaff, 91 U. S. and Johnson vs. Collier, 222 U. S. and other cases cited in the principal brief.

But besides that the whole bankruptcy proceeding, upon the facts stated in the bill, was a fraud and a sham and unavailable to defendants to avoid the judgment.

It is said however that the judgment in ejectment is invalid because of informality in the U. S. Marshal's return to the writ, and to support that contention counsel cite *Seacoast Lumber Co. vs. Camp Lumber Co., 63 Fla. 606.* But that case is not in any way in point. The court had there to deal with a service made in a county other than that in which the suit was brought, and held that the service must be sustained under the 5th clause of Sec. 1019 Rev. Stats. Fla. of 1892, and that where that clause was resorted to the return must show absence from the State of officers or resident business agents.

But where service is made in the county where the suit was begun, as was the fact in this ejectment suit, it is only necessary that the return should show absence from the county of the superior officers. Florida Central Etc. R. R. vs. Luffman, 45 Fla. 282. The court there says: "The officer serving the writ, before effecting service upon one of the inferior agents of the corporation must ascertain that none of those of higher degree is within the reach of his official arm; but he cannot be expected to know that they may not be found in some distant part of the State, and that is not required to be shown except in those cases where the statute plainly demands it."

The official arm of the Marshal was coextensive with the District and the District only. Process of the State Court runs throughout the State and is directed to all and singular the sheriffs of the State of Florida, ch. 4397 Laws of Fla., Acts of 1895. But the process in question here ran only throughout the District and the Marshal had no power to act beyond the District.

Lung vs. Northern Pacific, 19 Fed. 254-257.

Millers Admr. vs. Norfolk & Western, 41 Fed. 431.

Re Anderson, 94 Fed. Rep. 487.

Walker vs. Lee, 47 Fed. Rep. 645.

The return here (Rec. pp. 23 and 24) shows service upon "N. B. Childs one mile from Mulberry, Polk County, Florida as the person having the property herein described in his possesion; and as the agent of the Port Tampa Phosphate Company. * * * * The President, Vice President, Secretary, Treasurer, Directors and all other officers of said Port Tampa Phosphate Co. to the best of my knowledge, and information being out of the said Southern District of Florida." (Rec. pp. 23 and 24).

The legal requirement with respect to the return is as follows:

"All officers to whom process shall be directed shall note upon the same the time when it comes to hand; the time when it was executed, the manner of execution, and the name of the person upon whom it shall be executed, and if such person be served in a representative capacity, *the position occupied by him.* A failure to set forth the foregoing facts shall invalidate the service, but the return shall be amendable so as to state the truth at any time upon application to the court from which the process issued, and upon such amendment the service shall be as effective as if the return had originally stated such facts. A failure to state said facts in the return shall subject the officer so failing to a fine not exceeding ten dollars, at the discretion of the court." Rev. Stats. of Fla. (1892) Sec. 1026.

The return showed *facts,* not conclusions, viz: that service was upon the corporate agent in possession, and it would be difficult to imagine a more effective service.

The Marshal's return showed therefore a faithful compliance with the law, and was in the customary form, as must be presumed to have been considered by the judge who presided over the trial of the ejectment suit. His ruling on this point will not be lightly overturned. Shep-

ard vs. Adams, 168 U. S. 618. (In Florida there is in the statutory action of ejectment no judgment by default, but plaintiff must prove his case in open court to the satisfaction of the judge and jury.)

But independent of whether this judgment in ejectment can be sustained, and whether the bankruptcy proceedings were valid or invalid the bill shows a plain case for quieting title, and neither of the courts below decided the contrary, but in each instance the case went off on a supposed obligation of comity that leaves the plaintiffs without relief.

Following are some specific.

COMMENTS ON APPELLEES' BRIEF.

First: It assumes no equity in the bill on the ground that the controversies stated in the present bill are pending in the State Court between the same parties. This assumption has no basis of truth, for upon the facts admitted by the demurrer, appellees are not parties to any suit in Florida, but are trying to be made parties.

Second: It assumes that the same facts are stated in Burr's abated bill that are stated in the present bill. This assumption is absurd. See Brief pp. 1 and 2.

"Perversion of Principles."

(A) It says the bill assumes that *"complainants in the Florida suit"* are not proper parties, because they do not possess the character of trustees.

Answer, the bill shows that they are not parties at all but are trying to be made parties by a bill to revive.

(B) And may never be made parties because they do not possess the character of trustees.

(C) And further that the Federal Court in Massachusetts is asked to decide question of proper parties to a suit in Florida, which is very obviously not so.

(D) The brief says further the bill depends on *the proposition that* the Federal Court below *"can review proceedings in bankruptcy."* This is to say the least inaccurate for attack on the jurisdiction of the Court of Bankruptcy because procured by fraud, has no analogy to a *bill to review the proceedings of that court.*

(E) It says Section 21e precludes inquiry into the jurisdiction of a court of bankruptcy, a proposition we think the court will not commit itself to, in the face of this record.

(F) On pp. 4 and 5 it insists that the decision of the Court of Bankruptcy that it had jurisdiction bars any inquiry into its jurisdiction either collaterally or directly, a proposition that can scarcely be so broadly stated under our constitution.

"Alleged Frauds."

It says there could be no fraud because the Directors could have passed a resolution admitting inability to pay debts and willingness to be adjudged a bankrupt.

(a) Under laws of Massachusetts Directors could not do that.

In Re Bates Machine Co., 91 Fed. 625.

House Powder Co. vs. Geis, 123 C. C. A. 96.

(b) They did not do it and

(c) If they had done so it could not have been made the basis of bankruptcy proceedings except some creditor moved for corporations are by the terms of the Act excluded from voluntary bankruptcy.

(d) Such a resolution if valid, would not remove or condone the fraud of fabricating all jurisdictional facts, as charged in the bill.

(e) It says fraud did not affect rights of Hull, citing cases. But the cases cited *are all cases where* the stranger complained of a judgment obtained by fraud *before* he acquired his interest. Hull acquired his interest in *May*

1905, and bankruptcy proceedings were not commenced until *November 1905.* See Appellees' Brief p. 6.

We have already commented on its strictures with re-respect to the judgment in ejectment.

As for the insistence that the bankrupt was in possession at the date of the ejectment suit, on pages 39 and 40 of the Brief on the Motion to Dismiss or Affirm it will be seen that in Florida the statutory action of ejectment does not even on the part of the plaintiff admit possession in defendant, (much less would it be an effective admission against the ~~Trust~~ Company which claims through Hull's title as well as through the judgment) and the judgment rendered in ejectment gave the plaintiff no mesne profits which it would have done had defendant been in exclusive possession, and obviously on the facts alleged in the bill the possession of the Port Tampa Company was a possession subordinate to the possession of Hull set up in the bill.

Even though the bankrupt had had exclusive possession at the time of the alleged adjudication, that fact would not have helped it for upon the facts alleged in the bill it had no legal or moral right to possession. The appellees say in their brief, pages 8 and 9, that the bill does not allege that the bankrupt owned no interest in the properties. Such an averment would have been but a conclusion of law. The bill does aver facts showing that the Company did own no interest in the properties at the date of the alleged adjudication.

On page 10 it is said that in Section 26 of the bill the contention is made that one creditor could not appoint trustees. The bill makes no such contention but it is submitted that one creditor could not appoint without notice to all creditors, and that no appointment could have been made because there was no vacancy in the office of trustee and no notice given of any vacancy.

Judicial Notice.

We do not understand that upon demurrer to the bill a court of equity is at liberty to suppose any state of facts

consistent with the allegations of the bill, as suggested in the appellees' brief. On the contrary "a bill in equity is not to be read and construed as an indictment would have been read and construed a hundred years ago but it is to be taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of English speech."

Swift vs. U. S., 196 U. S. 376.

Plaintiff is not called upon to avoid defenses that may or may not be raised. If the appellees have any notion that in any litigation that has been had any adjudication favorable to them has been made, the proper course is for them to plead it in order that the circumstances may be properly inquired into. An opportunity to present the facts of this case to some tribunal is all that the plaintiffs have ever asked, and it is only the refusal under the guise of comity, first by the State Court and later by the Federal Court, to go into this inquiry that has brought the case here.

H. BISBEE,
GEORGE C. BEDELL,
Of Counsel for Appellants.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1913.

No. .

JOSEPH HULL ET AL., APPELLANTS,

vs.

ARTHUR E. BURR ET AL., APPELLEES.

BRIEF FOR APPELLEES.

I.

No Equity in Bill.

Appellants, by their bill of complaint filed in the District Court of the United States for the District of Massachusetts, attempted to remove to that court a controversy pending in equity in the Circuit Court of Polk County, Florida. Removal was sought apparently on the ground that the Circuit Court of Polk County had disagreed with certain of appellants' contentions and had been sustained in so doing by the Supreme Court of Florida. Both the Dis-

trict Court and the Circuit Court of Appeals declined to sustain the bill, and appellants are now before this court on appeal from its dismissal. Whatever may be the merits of the controversy in Florida, it is startling to suggest that there can be any ground for equitable interference with it in the Federal District Court for Massachusetts. Courts of equity exist to aid suitors entitled to equitable relief, and the appellants disclose no ground whatever why the equity court in Massachusetts should interfere with prior proceedings in the equity court in Florida, both of which are governed by and bound to administer the same rules. If the allegations of their bill are true appellants have a full, complete and adequate remedy in the Florida equity court, and there can be no equity in a bill to withdraw the controversy to Massachusetts.

Rickey Land, etc., Co. *vs.* Miller, 218 U. S., 258.
Prout *vs.* Starr, 188 U. S., 537.
Orton *vs.* Smith, 18 Howard, 263.
Pennell *vs.* Roy, 3 De G. M. & G., 126.
Mead *vs.* Merritt, 2 Paige, 402.
Carson *vs.* Dunham, 149 Mass., 52; S. C., 3 L. R. A., 203.
Royal League *vs.* Kavanagh, 233 Ill., 175.
Bigelow *vs.* Old Dominion Copper Co., 74 N. J. Eq., 457.

It is thus apparent at the outset that the appellants' bill was still-born, being devoid of a spark of equity to give it life, and its prosecution could have been enjoined by the Florida court.

Rickey Land., etc., Co. *vs.* Miller, 218 U. S., 258.

II.

Perversion of Principles.

It has already been pointed out in the brief on the motion that the bill was sought to be maintained in violation of at least two Federal statutes, and we shall not add to the argument on these points, but deal rather with the perversion of principles on which the argument for its support rests. In a nutshell the idea of the bill is that the complainants in the Florida suit are not *proper parties* to litigate with the defendants there, because they do not possess the status of trustees of the bankrupt claimed by them, and that the equity court in Massachusetts can so determine, notwithstanding the Florida courts have held that an equity court cannot inquire into these matters. Thus regarded, the bill in Massachusetts savors a good deal of a tempest in a teapot, for it asks the court there to pass upon a mere question of the proper parties to the Florida suit, although insisting the complainants in the Massachusetts bill are bound to win in the Florida suit on the merits of the controversy, whoever are parties to the bill there; and it does seem like trifling to ask the court in Massachusetts to spend its time in settling a question of no moment. Laying aside, however, this consideration, the bill necessarily depends upon an assertion of the proposition that a court of equity can review the proceedings of a court of bankruptcy, so far as they by adjudication establish the *status* of the bankrupt as a bankrupt, and create trustees to represent the bankrupt. As already pointed out in the former brief, section 21*e* of the bankruptcy act was designed to emphasize the contrary, but it is said that if section 21*e* was so intended it is unconstitutional. Under its constitutional authority to enact a bankruptcy act Congress certainly had the power to give to judgments of the bankruptcy court the same effect ordinarily accorded to all judgments, which are "conclusive evidence" of the point adjudicated, and it could even make the judgments of the

bankruptcy court, as it could of other courts, conclusive evidence of jurisdiction.

Ex parte City Bank, 3 Howard, text 317-318.

There are many decisions on the point which have uniformly given effect to the provision.

Ex parte Learoyd, *re* Foulds, 10 Ch. D., 3.
Ex parte French, *re* Trim, 52 L. J. Ch., 48.
Revell *vs.* Blake, L. R., 7 C. P., 308.
Hersey *vs.* Jones, 128 Mass., 473.
Wheelock *vs.* Hastings, 4 Met., 504.
Palmer *vs.* Jordan, 163 Mass., 350.
Howes *vs.* Burt, 130 Mass., 368.
Barstow *vs.* Adams, 2 Day, 70.
Rogers *vs.* Stevenson, 16 Minn., 68.
Dambmann *vs.* White, 48 Cal., 439.
Wooldridge *vs.* Rickert, 33 La. Ann., 234.
Cone *vs.* Purcell, 56 N. Y., 649.
Wilson *vs.* Taylor, 70 S. E., 286.

It is certainly true that Congress has conferred neither original nor reviewing jurisdiction in bankruptcy upon courts of equity. It is said that if section 21*e* has the effect contended for it will tear up by the roots the valuable and time-honored principle that when a claim is based upon the decree of another court inquiry can always be made into the jurisdiction of the court to render it. The principle relied upon in this contention is correct, but it is misunderstood by the appellants. Suppose, for the sake of illustration, that this court should reverse the Circuit Court of Appeals and District Court in this case, and decree that appellants were entitled to the relief prayed, could the courts of Florida inquire whether or not the decree of the Circuit Court of Appeals was final, and this court was without jurisdiction of the appeal therefrom? They could not, because this court is the final authority, with power to decide as to its jurisdiction. Similarly, it has often been decided that a judgment

rendered by a Federal court cannot be collaterally impeached where there is a failure to show jurisdiction by the pleadings, or even by averring the falsity of the facts alleged to show diverse citizenship where that is alleged as the ground of jurisdiction.

Riverdale Mills *vs.* Alabama, etc., Co., 198 U. S., 188.

Chase *vs.* Wetzlar, 225 U. S., text 86.

The true rule is that the judgment of a court of general jurisdiction, with power to decide on its jurisdiction, and which does decide on it, cannot be collaterally impeached in any other court, but only reversed or set aside by a court, if there be one, authorized to review it. In other words, the judgment of the final authority is conclusive in every case, and in respect to bankruptcy matters the sole and final authority is the bankruptcy court itself, subject to the very limited provisions for review prescribed by the bankruptcy act.

There is in reality, however, no question presented by the bill as to the jurisdiction of the bankruptcy court. The bankruptcy act made the District Court of Massachusetts a court of bankruptcy. The bankrupt is alleged to be a Massachusetts corporation. A petition is alleged to have been filed to secure its adjudication. The bankrupt, after adjudication, filed schedules of its property, and is alleged through its officers to have acquiesced in and promoted the proceedings. Jurisdiction, therefore, was undoubted.

In re First Nat. Bank, 152 Fed., 54.

III.

Alleged Frauds.

That the bankrupt company, through its directors, could have passed a resolution admitting in writing its inability to pay its debts and its willingness to be adjudged a bankrupt

on that ground, or have made a general assignment for the benefit of creditors, either of which were acts of bankruptcy, cannot be denied, and the entire burden of the bill amounts to nothing more than that a wrong method was followed to secure the adjudication, involving some carelessness in pleading and averments, which are sought to be magnified into stupendous frauds by characterizations usually based upon an erroneous legal predicate. Again, there is a tempest in a teapot, sought to be created nearly seven years after the adjudication, although the adjudication is not complained of by the bankrupt, and it could in no manner whatsoever prejudicially affect the rights of the appellants, as the trustees merely took whatever interest the bankrupt had in its property. Had any one objected to the adjudication at the time, proceedings could have been taken to secure an adjudication as to which no question could be raised, and it is not improper to quote their own language and style the attempt of appellants to now impeach the decree on garbled statements of law and fact as "pestiferous." Nor do we see how it can be an evil or unconscionable purpose for officers of a corporation in embarrassed circumstances to seek to have its assets administered for the benefit of all concerned through the medium of the bankruptcy court. But, apart from that, Hull could not complain of any alleged fraud in the adjudication, for it did not affect his rights in any manner, shape or form.

23 Cyc., 1068.
1 Black on Judgments, sec. 294 *et seq.*
Safe Deposit Co. *vs.* Wright, 105 Fed., 155.
Smith *vs.* Elliott, 56 Fla., 849.
Wilcher *vs.* Robertson, 78 Va., 602.

Nor was a court of equity the proper forum.
Simmons *vs.* Saul, 138 U. S., 439.

The sole reason for the present attempt lies in the fact that *after the adjudication* Hull sought by an ejectment suit

in Florida to withdraw the property of which the bankrupt was in possession from the control of the bankruptcy court, and the Supreme Court of Florida decided he could not thus bind the trustee in bankruptcy, not a party to the suit.

Hull *vs.* Burr, 61 Fla., 625.

The only claim, therefore, of any prejudice to the appellants through the bankruptcy proceedings arises from the fact that after the adjudication *they* sought to disturb the *status* of the property by the ejectment suit, and, according to the decision of the Florida court, were unsuccessful in so doing. In short, they were defrauded because they were disappointed in a scheme to withdraw the property from the effect of the adjudication as preserving the *status quo* for the benefit of all concerned. If, as contended by them, the Supreme Court of Florida was wrong in holding that the judgment in ejectment did not conclude the trustee, then appellants have no cause to allege that they were in any manner affected by the bankruptcy proceedings, and are thus precluded, on their own theory, from questioning them.

Judgment in Ejectment.

We feel warranted in adding a little to what is said in the former brief as to the judgment in ejectment, and in this connection it is necessary to bear in mind exactly what the record shows, in view of contentions now made by appellants which are not supported by the record.

The bill was amended so as to make a transcript of the record in the ejectment suit a part thereof (Transcript, p. 21). The bill, therefore, must be construed in connection with that record, which shows that the suit was brought on November 28, 1905; that the summons was served on December 6, 1905, on N. B. Childs, made a co-defendant with the bankrupt, "as the person having the property herein described *in his possession*, and as the agent of the Port Tampa Phosphate Company." The declaration, filed on the same

day the suit was instituted, likewise alleged the defendants to be in possession of the premises. It also contained the following allegation:

> "And the defendants have received the profits of the said lands since the 9th day of October, A. D. 1905, of a yearly value of ten thousand dollars, and refuse to deliver possession of the said lands to the plaintiff or to pay the profits thereof. And plaintiff claims possession and damages to the amount of $1,000.00."
>
> Transcript, p. 24.

It is further shown by the transcript (p. 25) that the judgment was recovered by default, and awarded Hull, the plaintiff, the right to recover possession of the premises, and this judgment was rendered March 13, 1906 (p. 26).

It is not true, therefore, as asserted in appellants' original brief at page 39, that the demurrer admits the bankrupt had not been in possession of the premises since May, 1905. There is no such allegation in the bill, which alleges that Hull, "*soon* after the delivery to him" of a deed, took possession of the property. It is hard to find a more indefinite word in the English language than "soon" (see Psalm, 99, v. 4; "As You Like It," act 3, sec. 2, Rosalind to Orlando), and the bill must be taken to admit the bankrupt's possession at the time of the adjudication and the appointment of a trustee, and up to the recovery of the judgment in ejectment, unless that proceeding was a mere "paper form." A pleading is to be construed most strongly against the pleader on the presumption that he states his case as favorably for himself, as the facts will admit, and the peculiar allegations of the bill in regard to Hull's title are not even inconsistent with the existence of such an equitable interest of the bankrupt as is disclosed by the report of the case on the first appeal to the Supreme Court of Florida.

Hull *vs.* Burr, 58 Fla., 432.

There is nowhere in the bill any allegation that the bankrupt possessed no equitable interest in the property, or that

the trustees possessed none, and its whole theory is that lawful trustees could assert some rights in the property. At any rate, the bill distinctly admits that prior to the institution of the ejectment suit creditors of the bankrupt were asserting it owned an interest in the property and that the trustees are asserting such interest in the Florida suit. And it must be taken as admitting the bankrupt's possession at the time of filing the petition and at the time of the adjudication and appointment of a trustee, for why, otherwise was the ejectment suit brought and prosecuted to judgment? It is in view of these facts that the effect of the judgment must be determined. It is perfectly plain, also, that the Florida court was right in holding this judgment could not bind the trustee, and it did not disregard, as asserted by appellants at page 40 of their brief, but applied the principle of Eyster *vs.* Gaff and Burbank *vs.* Bigelow, decided by this court. The principle there applied is the same as was applied in Orton *vs.* Smith, 18 Howard, 263, denying the right to file such a bill as the present, *viz.*, that pending proceedings in a court of competent jurisdiction are not to be arrested by subsequent proceedings in another court; or, in other words, where jurisdiction has attached in a competent court, that court has the right, under all ordinary circumstances, to proceed, irrespective of proceedings subsequently begun in another court.

See opinion of Justice Miller, Bracken *vs.* Johnson, Fed. Cases, No. 1761.

The underlying principle of these cases forbade the bill of appellants, which, *without any intervening equity,* undertook to devest the prior jurisdiction of the Florida court.

In the last place it may be said that the record of the ejectment suit entirely fails to show any service upon the Port Tampa Company. It shows service upon one N. B. Childs as the individual having the property in his possession *"and as the agent* of the Port Tampa Phosphate Company." The law of Florida permits service upon foreign corporations by serving a business agent resident in the county in which suit

is brought or an agent transacting business for them in this State, *in the absence from the State* of all directors and executive officers. The return fails to show jurisdiction of the bankrupt, in order to make the judgment effectual against it.

Seacoast Lumber Co. *vs.* Camp Lumber Co., 63 Fla., 604.

We shall not dwell further on the effect of the judgment, for the reason that it can in no way be material, unless the District Court in Massachusetts could have retained the bill as a bill to quiet title, as contended in the Circuit Court of Appeals—an untenable contention.

Orton *vs.* Smith, 18 Howard, 263.

Rickey Land, etc., Co. *vs.* Miller, 218 U. S., 258.

Besides, the allegations of the bill clearly show it never was intended as a bill to quiet title, because it wholly fails to set forth the interest or claim against which it is sought the complainants should be quieted, although the claim is the basis of the litigation in Florida. And it is perfectly plain that, even if jurisdiction to quiet title to the Florida property existed in the District Court of Massachusetts, in the absence of prior proceedings in the Florida court, there was no thought that the bill was intended for that purpose, nor did it contain the appropriate and necessary allegations.

Sanford *vs.* Cloud, 17 Fla., 557.

Houston *vs.* McKinney, 54 Fla., 600.

Other Erroneous Contentions.

It is contended by the 26th paragraph of the bill that a single creditor attending a meeting cannot act in respect to the election of new trustees. The contrary is true.

Re Thomas, *Ex parte* Warner, 1911 Sol. Journ., 482.

In any event there can be no collaterial attack.

Simpson *vs.* Gonzalez, 15 Fla., 9.

Hart *vs.* Bostwick, 14 Fla., 162.

Hull *vs.* Burr, 64 Fla., 83.

It is contended in appellants' brief, on page 28, that Manson *vs.* Williams, 213 U. S., 453, in the portion of the opinion quoted there, is an authority in their favor and against the appellees, while the very quotation itself, as plainly as language can express it, states that an adjudication in bankruptcy establishes the status of bankruptcy as against the world, though not the facts upon which it was founded, except as against parties entitled to be heard.

See

Revell *vs.* Blake, L. R., 7 C. P., 308.
Silvey *vs.* Tift, 123 Ga., 804.
Tilt *vs.* Kelsey, 207 U. S., 43.
I Remington on Bankruptcy, sec. 444 *et seq.*

And it is characteristic of their brief that they entirely misconceive the proper application of authorities cited, and fail to distinguish want of jurisdiction from errors or irregularities committed in the exercise of jurisdiction.

U. S. *vs.* Morse, 218 U. S., 493.
Cooper *vs.* Reynolds, 10 Wall., 308.
Ill. C. R. Co. *vs.* Adams, 180 U. S., text 34.
Noble *vs.* Logging Co., 147 U. S., text 173.
Hughes *vs.* Cuming, 58 N. E., 794.

Judicial Notice.

It is not contended by appellees that this court will take judicial notice of the facts presented on the former appeals to the Supreme Court of Florida. But it is contended that the court will take judicial notice of the laws of Florida, whether dependent upon statutes or judicial opinions.

Lamar *vs.* Micou, 114 U. S., 218.

To the extent, therefore, that any questions of Florida law are involved, and have been passed upon, such as the character of an ejectment suit in Florida and the question, if one of Florida law, whether the suit abated on the change

of trustees, the court will take judicial notice of the Florida decisions. We further contend that in properly construing the appellants' bill, where allegations are not direct, certain and positive and are to be construed against the pleader, the court can look to the Florida decisions as illustrating a state of facts that may exist consistently with the allegations of the bill, just as it could suppose any state of facts consistent with the allegations of the bill. It can further look to judicial opinions in Florida as to the effect of a decision on appeal from an interlocutory decree. And it can also look to the Florida decisions as establishing a rule that the adjudication and procedings of the bankruptcy court are not subject to collateral attack in the courts of Florida, as that is a point the Florida courts could finally settle *against*, but not in favor of, appellants.

Abbott *vs.* National Bank, 175 U. S., 409.

There is no possible merit in appellants' bill, regarded from any standpoint, and the decrees of the courts below must be affirmed if jurisdiction of this appeal is maintained.

Respectfully submitted,

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Counsel for Appellees.

HULL *v.* BURR.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 767. Argued March 3, 1914.—Decided June 22, 1914.

A suit does not arise under the laws of the United States unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of some law of the United States upon the determination of which the case depends and so appears not by mere inference but by distinct averments according to rules of good pleading.

In this case, *held* that a suit to restrain trustees in bankruptcy from prosecuting an equity suit against complainants in the state court on the ground that the bankruptcy proceedings were a fraud and that the appointment of the trustees was void was one arising under the laws of the United States within the meaning of § 24, Judicial Code, and the decision of the Circuit Court of Appeals is not final.

Although there may be a general prayer for relief, if no relief other than injunction against prosecution of a suit in the state court is brought to the attention of either the District Court or the Circuit Court of Appeals, the general prayer should be treated as abandoned.

The prohibition, § 720, Rev. Stat., now § 265, Judicial Code, against granting the writ of injunction by the Federal court to stay proceedings in a state court except where authorized by the Bankruptcy Act, *held*, in this case, to apply to a case commenced after adjudication of bankruptcy to enjoin the trustee from prosecuting a suit in ejectment, in the courts of the State where the land is situated. Such a case is not within the exception or in aid of the bankruptcy proceeding.

206 Fed. Rep. 4; 207 Fed. Rep. 543, affirmed.

THE facts, which involve the jurisdiction of this court of appeals from judgments of the Circuit Court of Appeals and also the construction and application of § 265, Judicial Code (§ 720, Rev. Stat.), are stated in the opinion.

Mr. George C. Bedell, with whom *Mr. H. Bisbee* was on the brief, for appellants.

Mr. Frank L. Simpson, with whom *Mr. E. R. Gunby* and *Mr. James F. Glen* were on the brief, for appellees.

MR. JUSTICE PITNEY delivered the opinion of the court.

The appellants, Joseph Hull, The Prairie Pebble Phosphate Company (hereinafter referred to as the Prairie Company), and the Savannah Trust Company, brought this action in equity in the District Court of the United States for the District of Massachusetts against appellees, Arthur E. Burr, Frank L. Simpson, and J. Howard Edwards, who are trustees in bankruptcy of the Port Tampa Phosphate Company, a corporation organized and existing under the laws of the State of Massachusetts. The bill was filed in August, 1912, and, defendants having demurred, an amended bill was filed, and it was stipulated that the demurrer should stand as a demurrer to the substituted bill. The District Court entered a decree sustaining the demurrer and dismissing the bill (206 Fed. Rep. 1). The Circuit Court of Appeals affirmed the decree (206 Fed. Rep. 4), and denied a petition for rehearing (207 Fed. Rep. 543).

The amended bill, besides showing diversity of citizenship, avers in substance as follows: That prior to the transactions in question, Stewart and Meminger were the owners in fee simple of a tract of land in Polk County, Florida, containing 440 acres, together with certain buildings and personal property situate upon it; that on May 22, 1905, in consummation of a prior contract, they conveyed all their right, title, and interest in the property to Hull by deed duly recorded, which vested in him a good legal title in fee simple to the real estate, with full title to the personal property and the right to possession as against all persons, "and his recorded paper title to all the said properties was perfect;" that before the delivery of the deed by Stewart and Meminger to Hull the Port Tampa

Company claimed to own some equitable interest in the property, under a contract between it and Stewart and Meminger, which interest Hull purchased for a full consideration, and before the delivery of said deed to Hull the Port Tampa Company adopted and placed upon its records a resolution reciting its agreement to sell the property to Hull, and authorizing and directing Stewart and Meminger to make a deed to him; that soon after the delivery of the deed Hull took possession; that on June 7, 1907, he executed and delivered to the Prairie Company a deed of conveyance of all his right, title, and interest in said properties for the consideration of about $37,000, which deed was shortly afterwards recorded, and the Prairie Company took actual and peaceable possession of the property and has continued to hold it until the present time, having made valuable improvements upon it; that afterwards, and prior to March 26, 1908, the Prairie Company executed and delivered to the Trust Company a deed of trust conveying its right, title, and interest in said properties, together with other properties, to secure the payment of bonds amounting to about $1,800,000, and the deed of trust was duly recorded; that it came to the knowledge of Hull that certain creditors of the Port Tampa Company had asserted that the company owned some interest in said properties, and on the twenty-eighth of November, 1905, he commenced an action of ejectment against that company in the United States Circuit Court for the Southern District of Florida, being the district in which the property was situate; that the company was served with process therein on December 6, 1905, and such further proceedings were had that on March 13, 1906, upon the verdict of a jury, a judgment was rendered adjudging that Hull was entitled to recover from the Port Tampa Company the fee simple title and right of possession of the lands in question. The bill sets up that on November 8, 1905, a petition in bank-

ruptcy was filed against the Port Tampa Company "in this court of bankruptcy" [the District Court of the United States for the District of Massachusetts]; that a subpœna was issued thereon returnable on the twentieth day of the same month, and returned served, and that on the return-day an appearance was entered for the company by one J. H. Robinson. Copies of the creditors' petition, the subpœna, and the appearance are appended to the bill as an exhibit. The bill alleges that defendants assert that by virtue of a decree in bankruptcy made in said District Court on November 27, 1905, adjudging the Port Tampa Company bankrupt, they are the owners of an equitable interest or estate in the said lands and other properties, and that the defendant Burr was, on December 27, 1905, appointed sole trustee in bankruptcy of the company; that he resigned as such trustee on March 12, 1909, and on the same day his resignation was accepted, and Burr, Simpson, and Edwards were appointed trustees in his place; and that defendants claim that by the adjudication in bankruptcy and their appointment the title to an interest or estate in said lands became vested in them as such trustees; that on or about March 26, 1908, and before he resigned as trustee, Burr brought a suit by bill in equity in the circuit court in and for Polk County, Florida, against complainants, to establish such interest or estate, but there has been no trial of this suit on the merits, nor had the same been brought to final issues of fact and law before Burr's resignation; that on January 9, 1912, the defendants filed in said state court a supplemental bill of complaint, wherein they averred that said suit was brought by Burr as trustee in bankruptcy, and that Burr resigned as such trustee on March 12, 1909, and prayed that they might be substituted as complainants in his place; that the present complainants filed an answer to the said supplemental bill, but that the issues have not been tried, and no decree has been rendered mak-

ing the defendants as trustees complainants in said suit. The present bill then proceeds to attack the proceedings and adjudication in bankruptcy, and the title of the defendants as trustees, as fraudulent and void upon various grounds, which may be summarized as follows: That the Port Tampa Company's principal place of business was not in Massachusetts, as alleged in the petition, and that it had no business except in Florida; that it was not insolvent, and did not commit the act of bankruptcy alleged, or any act of bankruptcy; that the petitioning creditors were directors of the company and knew the company was solvent and had committed no act of bankruptcy; that the jurisdictional facts were falsely and fraudulently averred, being fabricated for the purpose of pretending to state a cause within the jurisdiction of the court; that the petitioning creditors controlled both sides of the litigation through their ownership of a majority of the company's stock; that Robinson, who entered the appearance in behalf of the Port Tampa Company, was not in fact authorized to appear for or represent the company; and that the petition was fraudulently made to appear as an involuntary petition by creditors, whereas in truth and in legal effect it was a voluntary petition on the part of the company and its officers and directors. It is also alleged that the appointment of defendants as trustees in the place of Burr on March 12, 1909, was invalid, because no judge or referee appointed them, their claim being that in fact they were appointed trustees at a meeting of creditors, whereas complainants allege that the pretended call by the referee for the meeting of creditors was issued at a time when there was no vacancy in the office of trustee; that ten days' notice of the meeting was not given by mail to all the creditors as required by law; that the only creditor who attended the meeting was one Wills, a director of the company, and that there were ten other creditors who had proven claims; that Wills did

not own a *bona fide* provable claim to the amount of one-half of the claims that had been proven; and that the appointment of defendants as trustees was made by Wills alone. Complainants insist that there was no power or jurisdiction in any creditor or creditors to appoint defendants as trustees on March 12, 1909, because at that time there was no vacancy in the office of trustee, since Burr had not then resigned and his resignation had not been accepted by the court. The bill further avers that in their answer to the supplemental bill in the equity suit in the circuit court of Polk County, Florida, the present complainants set up the defense of "want of jurisdiction of the said court of bankruptcy to render any decree of adjudication, and that such alleged decree was void on the face of the said proceedings"; that this part of the answer was excepted to and the exceptions sustained by the order of the Polk County circuit court; that on appeal, the Florida Supreme Court affirmed this order on July 3, 1912, ruling that all such defenses were collateral attacks upon the bankruptcy proceedings, which were not permissible, the ruling being expressed in the following words: "The assaults made upon the bankruptcy proceedings in the Federal Court of Massachusetts by the answer of the appellants to the supplemental bill of the appellees in the particulars wherein said answer was excepted to by the appellees is simply a collateral attack upon the judgments, orders and proceedings in said bankruptcy court that is not permissible either by way of defence to the supplemental bill or to the original bill as amended;" that by reason of the said judgment of the Florida courts the present complainants cannot by way of defense to the bills of complaint in those courts "have and obtain that speedy, adequate and appropriate relief that this court is competent to render upon this original bill of complaint; and your orators fear that the Florida courts will decline to adjudicate as to the character

and title of the defendants as trustees and their competency to attack your orators' title to said properties, as herein set forth, upon any answer to the said bills in the said state court." The present amended bill further sets up that "Upon the facts hereinbefore set forth, which are conclusively provable to be true by the record of the proceedings of the said court of bankruptcy, if the said Port Tampa Company had any title to any of the aforesaid properties, legal or equitable, at the time of the said alleged decree of adjudication, such title still remains in the said company; that your orators are still liable to be sued by the said company in any court of competent jurisdiction to assert such title, and that a final decree in the Florida state court for or against the defendants as such alleged trustees would not be pleadable in bar of a suit by the said company against your orators to assert such title." The specific prayer is for a decree to restrain defendants "from asserting or claiming as trustees in bankruptcy, in any court or place, any right, title or interest in or to any of the properties herein described until the further decree of this court." There is also a prayer for general relief. Appended as exhibits and made a part of the bill are the copies of the petition, subpœna, return, and appearance in the bankruptcy proceedings, already mentioned, and a transcript of the record of the ejectment suit in the United States Circuit Court for the Southern District of Florida.

The District Court, in sustaining the demurrer, held that since upon the face of the bankruptcy proceedings there was no want of jurisdiction over the parties or the subject-matter, and the decree was not void in form, it could not be collaterally attacked, and could be assailed only by a direct proceeding in a competent court; citing *Lamp Chimney Co.* v. *Brass & Copper Co.*, 91 U. S. 656, 662; *Graham* v. *Boston, Hartford & Erie R. R. Co.*, 118 U. S. 161, 178. Treating the present suit as a direct at-

tack, the court held, first, that no right or interest of complainants appeared to be so prejudiced by the adjudication in bankruptcy as to entitle them to equitable relief against it; that the adjudication concerned only the bankrupt and its creditors, since it made no difference to complainants whether the claim to the Florida properties was asserted by the bankrupt itself or by its trustees; that the allegation that a final decree in the Florida suit would not bar an action brought by the company itself was a mere conclusion of law, not admitted by the demurrer, and an unsound conclusion in view of the facts alleged; that, the adjudication not having been questioned by the bankrupt or its creditors, they were bound by it, and by virtue of it the trustees were in the bankrupt's place so far as concerned any claim that it could assert to the Florida properties. And, secondly, that there was a defect of necessary parties, because the only defendants named in the bill were the bankruptcy trustees, respecting whom it was not alleged that they were parties to the bankruptcy proceedings, nor that they participated in the fraud whereby the adjudication was alleged to have been procured.

The Circuit Court of Appeals, while agreeing with this reasoning, placed its decision upon the ground that complainants were invoking not the powers of the District Court in bankruptcy, but its general powers as a court in equity; that it also appeared that the proceedings in Florida were insituted by a bill in equity with the parties reversed; that the Florida court was a chancery court and a court of superior jurisdiction in equity, and for present purposes of equal dignity and authority with the District Court of the United States for the District of Massachusetts; that the bill in substance merely invoked the general equitable jurisdiction of the District Court in order to restrain proceedings in a state court proceeding in equity in a prior suit between the same parties; and that this ran

counter to § 720, Rev. Stat. (§ 265, Jud. Code, 36 Stat. 1162, c. 231), as well as to the general principle that the authority of the court first acquiring jurisdiction, the parties being the same, must prevail; citing *Marshall* v. *Holmes*, 141 U. S. 589, 596; and *Central National Bank* v. *Stevens*, 169 U. S. 432, 462.

There is a motion to dismiss the appeal, based upon the ground that the jurisdiction of the District Court depended solely upon diversity of citizenship, and that therefore the decree of the Circuit Court of Appeals is final, under § 128, Judicial Code (36 Stat. 1133, c. 231). The motion must be granted unless the suit was one arising under the laws of the United States, within the meaning of the first subdivision of § 24 of the Code. The rule is firmly established that a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of some law of the United States, upon the determination of which the result depends. And this must appear not by mere inference, but by distinct averments according to the rules of good pleading; not that matters of law must be pleaded as such, but that the essential facts averred must show, not as a matter of mere inference or argument, but clearly and distinctly, that the suit arises under some Federal law. *Hanford* v. *Davies*, 163 U. S. 273, 279; *Mountain View Mining & Milling Co.* v. *McFadden*, 180 U. S. 533, 535; *Defiance Water Co.* v. *Defiance*, 191 U. S. 184, 191; *Arbuckle* v. *Blackburn*, 191 U. S. 405, 413; *Bankers Casualty Co.* v. *Minneapolis &c. Ry. Co.*, 192 U. S. 371, 383; *Shulthis* v. *McDougal*, 225 U. S. 561, 569.

We have not considered whether the action could be regarded as ancillary to the proceedings in bankruptcy, and for that reason maintainable in the District Court as a suit arising under the laws of the United States (see *Freeman* v. *Howe*, 24 How. 450, 460; *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609, 633; *Buck* v. *Colbath*, 3 Wall. 334,

345; *Christmas* v. *Russell*, 14 Wall. 69, 81; *Krippendorf* v. *Hyde*, 110 U. S. 276, 281; *Lammon* v. *Feusier*, 111 U. S. 17, 19; *Covell* v. *Heyman*, 111 U. S. 176, 179, 180; *Dewey* v. *West Fairmont Gas Coal Co.*, 123 U. S. 329, 333; *Gumbel* v. *Pitkin*, 124 U. S. 131, 144; *Morgan's Co.* v. *Texas Central Railway*, 137 U. S. 171, 201; *Byers* v. *McAuley*, 149 U. S. 608, 615; *Root* v. *Woolworth*, 150 U. S. 401, 413; *Moran* v. *Sturges*, 154 U. S. 256, 274; *White* v. *Ewing*, 159 U. S. 36, 39; *Carey* v. *Houston & Texas Ry.*, 161 U. S. 115, 130; *In re Johnson*, 167 U. S. 120, 125; *Pope* v. *Louisville &c. Ry.*, 173 U. S. 573, 577; *Wabash Railroad* v. *Adelbert College*, 208 U. S. 38, 54), because complainants have not planted themselves upon that ground.

Complainants are not parties to the proceeding in bankruptcy, and are setting up rights in opposition to the adjudication and the appointment of trustees therein. They seek to have the trustees restrained from prosecuting the equity suit against them in the state court of Florida, and to that end undertake to show (a) that the bankruptcy proceedings were void for want of jurisdiction; (b) that the entire proceedings were a fraud upon the Bankrupt Act; and (c) that, even if the proceedings were valid, the appointment of the trustees was void. This is the theory of the bill of complaint, and it is by this that the right of ultimate appeal to this court is to be tested, rather than by the grounds upon which the District Court and the Circuit Court of Appeals reached conclusions adverse to the relief prayed. Were the views adopted by those courts found to be untenable, it would be necessary to pass upon the attack made by complainants upon the title of the trustees in bankruptcy; and to do this would require us to determine the construction and effect of those provisions of the Bankruptcy Act that bear upon the matters of fact averred as the basis of the attack. We deem, therefore, that the suit is one arising under the laws of the United States, within the meaning of

§ 24, Judicial Code, and the motion to dismiss will be denied.

Upon the merits, we find it unnecessary to consider the views expressed by the District Court, since it seems to us that the view of the Circuit Court of Appeals as to the effect of § 720, Rev. Stat., is correct, and is sufficient to dispose of the case.

The substance of the matter is that complainants allege that they are the owners of certain property in Florida in which defendants, as trustees in bankruptcy of the Port Tampa Company, assert an equitable claim or interest, to establish which they are prosecuting or attempting to prosecute an equitable action in a Florida state court against complainants. The latter aver that because of fraud, or for other reasons, the proceedings and adjudication in bankruptcy and the appointment of defendants as trustees are invalid, and that for this reason any decree that may be made by the Florida state court will not be binding upon the Port Tampa Company. As already mentioned, the specific prayer is that defendants may be restrained from asserting or claiming as trustees in bankruptcy, in any court or place, any right, title or interest in the property. There is a prayer for general relief, but it was pointed out by the Circuit Court of Appeals (207 Fed. Rep. 543, 544) that no right to relief other than by way of an injunction was brought to the attention of the District Court or of the Court of Appeals upon the hearing. The general prayer should therefore be treated as abandoned.

So far as the action already pending in the Florida court of equity is concerned, the case is clearly within § 720, Rev. Stat. (§ 265, Judicial Code, 36 Stat. 1162, c. 231): "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bank-

ruptcy." The latter clause formerly had reference to § 5106, Rev. Stat. (§ 21 of the Bankruptcy Act of March 2, 1867, 14 Stat. 517, 526, c. 176); in the place of which we now have § 11 and sub-divisions 7 and 15 of § 2 of the Bankruptcy Act of July 1, 1898 (30 Stat. 544, 546, 549, c. 541). It is quite evident that the injunction sought by the present complainants is not one authorized by the Bankruptcy Act.

The prohibition against injunctions to stay proceedings in state courts originated in the act of March 2, 1793 (c. 22, § 5, 1 Stat. 333, 335), and has been constantly observed by the courts. See *Diggs* v. *Wolcott*, 4 Cranch, 179; *Peck* v. *Jenness*, 7 How. 612, 625; *Watson* v. *Jones*, 13 Wall. 679, 719; *Haines* v. *Carpenter*, 91 U. S. 254, 257; *Dial* v. *Reynolds*, 96 U. S. 340; *Chapman* v. *Brewer*, 114 U. S. 158, 172; *United States* v. *Parkhurst-Davis Co.*, 176 U. S. 317, 320; *Hunt* v. *New York Cotton Exchange*, 205 U. S. 322, 338; *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226.

It is recognized, however, that § 720 was not intended to limit the power of the Federal courts to enforce their authority in cases that on other grounds are within their proper jurisdiction; and hence, it has been held that, in aid of its jurisdiction properly acquired, and in order to render its judgments and decrees effectual, a Federal court may restrain proceedings in a state court which would have the effect of defeating or impairing such jurisdiction. *French, Trustee*, v. *Hay*, 22 Wall. 250; *Dietzsch* v. *Huidekoper*, 103 U. S. 494, 497; *Julian* v. *Central Trust Co.*, 193 U. S. 93, 112; *Traction Co.* v. *Mining Co.*, 196 U. S. 239, 245.

The contention that the present case falls within this exception to the general application of § 720, because the bill is really filed in aid of the judgment of a Federal court, that is to say, the judgment in favor of Hull in the ejectment suit in the Circuit Court of the United States for

the Southern District of Florida, will not bear analysis. The ejectment suit was commenced after the adjudication of bankruptcy, and the bill does not aver that the judgment cut off the equitable rights of the Port Tampa Company, but on the contrary declares that if that company had any title to the property, legal or equitable, at the time of the adjudication of bankruptcy, such title still remains in the company. It is not averred that the claim of equitable right on the part of the company is inconsistent with the judgment, or should be subordinated to it. The present trustees, or either of them, were not made parties to the ejectment suit, nor is the company made a party to the present action. And, upon the whole, it seems to us that by no interpretation or construction can the present bill be deemed to have been filed in aid of the judgment in ejectment, or be sustained upon that theory.

It is argued that the bill cannot be deemed to have as its object the staying of a pending suit in the state court, because that action abated upon Burr's resignation as trustee, and no further proceeding can be had until his successors have been made parties. To this point a decision of the Florida Supreme Court in the very action is cited; *Hull* v. *Burr*, 62 Florida, 499. We do not interpret this decision as sustaining the contention, and in a subsequent stage of the same litigation (64 Florida, 83), the court distinctly held that the action did not abate on the resignation of Burr, but might be proceeded with by his successors when appointed, the same as if originally instituted by them; and that a supplemental bill was the proper procedure to have such successors formally brought into the case as parties. Indeed, it is only upon the theory that defendants are prosecuting that suit that the complainants show ground for an injunction against them.

To the suggestion that the term "any court," in the bill of complaint, may include other Federal courts, it is

sufficient to say that the bill is devoid of any showing that defendants are asserting claims against complainants' title in any court other than the Florida state court. Hence there is no occasion to invoke the general rule that the court first obtaining jurisdiction of a controversy should be permitted to proceed without interference. *Peck* v. *Jenness*, 7 How. 612, 624; *Central National Bank* v. *Stevens*, 169 U. S. 432, 459; *Bigelow* v. *Old Dominion Copper Co.*, 74 N. J. Eq. 457, 473, *et seq.*

We deem that the main object of the bill, to which all else is incidental, is in contravention of § 265 of the Judicial Code (formerly § 720 of the Revised Statutes), and that therefore the decree should be

Affirmed.